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No. _____

In The

Supreme Court of The United States

October Term 1997

In re: UNIVERSAL LIFE CHURCH, INC.,
Debtor.

UNIVERSAL LIFE CHURCH, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA
Respondent.

Petition For A Writ Of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Ninth Circuit erroneously construed the police or regulatory power exception, 11 U.S.C. §362(b)(4), to the Bankruptcy Code's automatic stay provision under 11 U.S.C. §362(a)(1), as a vast exception which effectively swallows several of the broad and overlapping subsections contained in 11 U.S.C. §362(a), even when the legislative history and federal bankruptcy common law from other Circuits unequivocally indicate that the exception is to be given a narrow construction and is not to apply in situations such as the present case where the governmental unit, here the Internal Revenue Service, is seeking to protect a pecuniary interest.

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REASONS FOR GRANTING THE WRIT

1. The Petition must be granted because the Ninth Circuit, in applying §362(b)(4) in its December 30, 1997, opinion, erroneously formulated and imposed upon ULC a "solely" pecuniary standard which is in conflict with decisions from other circuits. This is an important question of federal law which has not been, but should be, settled by this Court 5

2. The Ninth Circuit's opinion below is in conflict with this Court's Whiting Pools decision, as well as the plain meaning and legislative history of §362(b)(4), which unequivocally indicate that Congress intended the section to be the narrowest of exceptions to the automatic stay. 17

3. The Ninth Circuit, in affirming the District Court, has sanctioned both the District Court's and the Bankruptcy Court's departure from the usual course of judicial proceedings to such an extent as to call for an exercise of this Court's supervisory power. This is because the Bankruptcy Court, as the trier of fact, failed to even consider the issue of whether Respondent was collaterally estopped from contesting Petitioner ULC's tax-exempt status, whereas the District Court (sitting as an appellate court) improperly made a determination of changed circumstances, hence precluding the application of collateral estoppel, based solely upon unproven assertions to that effect made by Respondent and the IRS. 25

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, Universal Life Church, Inc., respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (as amended on December 30, 1997) is reported at In re Universal Life Church, Inc.; Universal Life Church, Inc. v. United States, 128 F.3d 1294 (9th Cir. 1997). A copy of the original October 6, 1997, opinion is reproduced in the Appendix at p. 20, and a copy of the amended December 30, 1997, opinion is reproduced in the Appendix at p. 3. The opinion and order of the United States District Court for the Eastern District of California is reported at Matter of Universal Life Church, Inc.; Universal Life Church, Inc. v. United States, 191 B.R. 433 (E.D. Cal. 1995). A copy of the District Court's opinion is reproduced in the Appendix at p. 37. The November 19, 1993, order of the United States Bankruptcy Court for the Eastern District of California, from which Petitioner's appeal to the District Court was taken, was not reported. A copy of the Bankruptcy Court's order is reproduced in the Appendix at p. 64.

JURISDICTIONAL STATEMENT

On October 6, 1997, the Ninth Circuit Court of

Appeals entered judgment and opinion affirming the District Court's November 6, 1995 order and opinion. The District Court's order and opinion, in turn, affirmed the Bankruptcy Court's November 19, 1993. order denying Petitioner's motion for (1) an order that the IRS's revovation of Petitioner's tax exempt status was void and (2) damages.

On or about October 9, 1997, Respondent moved the Ninth Circuit Court of Appeals to modify its opinion. Respondent's motion was construed by the Ninth Circuit Court of Appeals as a petition for rehearing, which was denied in an order dated December 30, 1997; however, the Ninth Circuit Court of Appeals sua sponte amended its October 6, 1997, opinion on December 30, 1997. Appendix pp. 4-5.

On November 21, 1997, Petitioner filed with the Ninth Circuit Court of Appeals a Petition for Rehearing and Suggestion for En Banc Review of its October 6, 1997, opinion. On December 31, 1997, the Ninth Circuit Court of Appeals entered an order denying petitioner's petition for rehearing and rejecting Petitioner's suggestion for en banc review. Appendix pp. 1-2.

The jurisdiction of this Court to review the judgment and opinion of the Ninth Circuit Court of Appeals is invoked pursuant to 28 U.S.C.§ 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

11 U.S.C. §362(a), (b)(4)

STATEMENT OF THE CASE

Petitioner the Universal Life Church, Inc. (hereinafter referred to as "ULC") filed a petition in Chapter 11 in the U.S. Bankruptcy Court for the Eastern District of California, Modesto Division, on November 29, 1989. On January 12, 1990, ULC instituted an adversary proceeding under 11 U.S.C. §505 against Respondent the United States of America, and the State of California, to determine its income tax liabilities for the fiscal years 1978 through 1990.[1]

On January 8, 1991, the IRS issued a Final Notice Letter notifying ULC of an administrative decision that ULC was not tax exempt under 26 U.S.C. §501(c)(3), effective May 1, 1981, for the fiscal years ended April 30, 1982, through April 30, 1985, inclusive. This Final Notice demanded that ULC file corporate income tax returns pursuant to 26 U.S.C. §6012 for these periods. The IRS did not seek relief from the Bankruptcy Code's automatic stay provisions in §362 before revoking ULC's tax exempt status, although it was requested by ULC's counsel to do so. The record below reflects that prior to the revocation, the IRS indicated in a letter to ULC's bankruptcy counsel that it would not seek relief from the stay.

The IRS, through a letter from counsel, again

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[1]The Bankruptcy Court is vested with core jurisdiction under §505 to determine such tax liabilities. Unless otherwise indicated, all statutory references herein will be within Title 11, United States Code.

demanded that ULC file corporate income tax returns for the above-described periods, even referring to ULC's "legal obligation" to file such returns. The IRS also filed, on June 1, 1993, a "discovery" motion in the Bankruptcy Court asking that ULC be ordered to file the corporate income tax returns. The Bankruptcy Court granted this motion on August 30, 1993, and ULC appealed the order to the U.S. District Court for the Eastern District of California. The District Court did not expressly rule on this issue, althouth it effectively disposed of it by holding that it was "moot" in light of its rulings on the §362 automatic stay issues. Appendix p. 63.

ULC has continuously maintained that the filing of corporate income tax returns would be an admission of tax liabilities and would normally result in an assessment of income taxes, interest, and penalties.[2] ULC has also continuously maintained that while a corporation cannot be compelled to file such returns, the Secretary of the Treasury can do so on its behalf,[3] and it may be subject to civil and criminal penalties for its failure to do so.[4]

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[2]26 U.S.C. §6201(a)(1) provides, in relevant part, that "The Secretary shall assess all taxes determined by the taxpayer." This section allows the automatic assessment of taxes shown on a return.

[3]26 U.S.C. §6020.

[4]26 U.S.C. §§6651, 7203.

On July 20, 1993, ULC filed in the Bankruptcy Court a motion seeking, inter alia, a determination that the IRS's revocation of ULC's tax exempt status was void as violative of §362's automatic stay. The Bankruptcy Court ruled, in a First Amended Order filed on November 19, 1993, that the revocation was either outside the scope of §362(a), or, if in §362(a), the revocation fell within §362(b)(4)'s police or regulatory power exception to the stay. ULC filed a timely notice of appeal of the Bankruptcy Court's order on November 22, 1993.

On November 6, 1995, the District Court, sitting as an appellate court, filed its opinion and order holding that the revocation violated both branches of §362(a)(1),[5] but affirming the Bankruptcy Court's ruling that the §362(b)(4) exception applied. Appendix pp. 53-56.

On January 5, 1996, ULC filed a timely notice of appeal of the District Court's order to the Ninth Circuit Court of Appeals. On October 6, 1997, the Ninth Circuit issued an opinion affirming the judgment of the District Court with respect to the application of §362(b)(4). Appendix p. 32. In its opinion, the Ninth Circuit assumed that the IRS had violated both branches of §362(a) in its revocation of ULC's tax-exempt status. Appendix p. 25. In its application of §362(b)(4), the Ninth Circuit formulated a new "solely"

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[5]I.e., §362(a)(1)(i) and (ii). See Delpit v. Commissioner of Internal Revenue, 18 F.3d 768, 770 (9th Cir. 1994).

pecuniary standard, firmly contradicting the plain meaning of §362(b)(4), Congress' clearly articulated intent in enacting the statute, and case law from other circuits. In addition, the Ninth Circuit improperly applied the "public policy" test in its determination that the §362(b)(4) exception applied to Petitioner herein. Appendix pp. 26-30.

On December 30, 1997, the Ninth Circuit Court of Appeals filed an order denying Respondent's motion to amend its October 6, 1997, opinion (after construing the motion as petition for rehearing); however, the Ninth Circuit sua sponte amended its October 6, 1997, opinion on December 30, 1997. Appendix pp. 4-5.

The Ninth Circuit's December 30, 1997, amended opinion specifically acknowledged as "persuasive" ULC's argument that the IRS's 1991 revocation of its the tax-exempt status violated the automatic stay under §362(a) (including both §362(a)(1)(i) and (ii)), but failed to rule dispositively on the issue, due to its (erroneous) assumption that §362(b)(4) was dispositive.

ULC filed a Petition for Rehearing and Suggestion for En Banc Review on November 21, 1997, requesting the Ninth Circuit to review its opinion in a case of first impression,with such clear and broad ramifications for the future application of the Bankruptcy Code,and specifically the exception to the automatic stay codified at §362(b)(4).

On December 31, 1997, the Ninth Circuit Court of Appeals entered an order denying ULC's petition for

rehearing and rejecting its suggestion for rehearing en banc. Appendix pp. 1-2.

As discussed in the Reasons for Granting the Writ below, the effect of the foregoing errors committed by the District Court and the Ninth Circuit has been to jeopardize the important principles of uniformity in the application of the Bankruptcy Code among the circuits, as well as to provide precedent for an interpretation of §362(b)(4) which is contrary to the plain meaning of the statute as well as Congress' intent in enacting the narrowest of exceptions to the Bankruptcy Code's automatic stay.

REASONS FOR GRANTING THE WRIT

1. **The Petition must be granted because the Ninth Circuit, in applying §362(b)(4) in its December 30, 1997, opinion, erroneously formulated and imposed upon ULC a "solely" pecuniary standard which is in conflict with decisions from other circuits. This is an important question of federal law which has not been, but should be, settled by this Court.**

One bankruptcy court within the Ninth Circuit has recently observed that:

> "The circuits are divided on the scope of the police or regulatory exception [under §362(b)(4)], and the Ninth Circuit has not taken a position. The First and Sixth Circuits take the more narrow approach, under which

> the exception applies only where the government is seeking through its action to protect public health, safety, and welfare, and not seeking to protect a pecuniary interest. In contrast, the Eighth Circuit takes a slightly broader approach to the scope of the exception, and applies it where the state will not obtain a pecuniary advantage, as opposed to protecting a pecuniary interest." [Citations omitted].

In re Lazar, 200 B.R. 358, 368-369 (Bkrtcy.C.D.Cal. 1996).

The author of the bankruptcy court's opinion in Lazar thus sums up the split of authority which has resulted from several circuits each attempting to formulate a rule to meet the requirements of §362 (b)(4). This split of authority has resulted in spite of the unambiguous plain meaning of the statute, as well as section-specific statements of Congress' intent in enacting §362(b)(4). The language of §362 (a)(1) broadly stays any proceeding "against the debtor" or to "recover a claim against the debtor." In contrast, §362 (b)(4)'s police or regulatory power exception to the §362 (a)(1) stay provision narrowly excepts form the automatic stay certain exercises of a government's police or regulatory power.

The Congressional intent behind this legislative provision is not merely speculative, but is instead specifically earmarked in the legislative history by the section-specific statements of the legislative leaders from both the House and

Senate who chaired the committees amending the Bankruptcy Code in the Bankruptcy Reform Act of 1978, P.L. 95-598.

The Hon. Don Edwards, Chairman of the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, upon introducing the House Amendment to the Senate Amendment stated:

> This section [§362 (b) (4)] is intended to be given a **narrow construction** in order to permit governmental units to pursue actions to protect the public health and safety and **not to apply to actions by a governmental unit to protect a pecuniary interest** in property of the debtor or property of the estate. [Emphasis added].

124 Cong.Rec. H 11089 (daily ed. Sept. 28, 1978), *reprinted* in 1978 U.S.C.C.A.N. 5787, 6444-45. The Hon. Dennis Deconcini, Chairman of the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judicary, made a verbatim statement upon introducing the Senate Amendment to the House Amendment. 124 Cong.Rec. S 17406 (daily ed. October 6, 1978), *reprinted* in 1978 U.S.C.C.A.N. 5787, 6505, 6513.

The foregoing legislative history is expressly manifested in the plain language of §362(b)(4) as well as both §362(a)(1)(i) and (ii). As indicated in footnote 5, supra, the Ninth Circuit in Delpit has recognized that §362(a)(1) is actually divided into two distinct branches or clauses. 18

F.3d at 770. The Ninth Circuit in Delpit has also recognized that substantial overlap among the various subsections contained in §362(a) was intended by Congress:

> Substantial overlap is common among the automatic stay provisions of Section 362(a). This overlap reflects Congress' intent to describe **every conceivable action** that might impinge upon the debtor's "breathing spell," even though such an approach might result in some redundancy. [Emphasis added].

Id. at 772. As to the "breathing spell" afforded bankrupt debtors by §362(a), the Ninth Circuit stated:

> Congress intended to give debtors a "breathing spell" from their creditors and to stop "all collection efforts, all harassment, and all foreclosure actions." The automatic stay allows debtors, during the period of the stay, "to be relieved of the financial pressures that drove [them] into bankruptcy." Accordingly, Section 362 is "extremely broad in scope" and should apply to almost any type of formal or informal action against the debtor or the property of the estate." [Citations omitted].

As an illustration of the substantial overlap intended by Congress among §362(a)'s various subsections, the Ninth Circuit in Delpit noted that a creditor's attempt to enforce a pre-bankruptcy judgment outside of Bankruptcy Court would

violate four provisions of §362 simultaneously. Id. at 772. It is therefore not surprising in the instant case that the IRS's revocation of Petitioner's tax-exempt status violates no fewer than two of the subsections within §362(a) -- namely §362(a)(1) and §362(a)(6). As indicated above, the District Court in the instant case made an express finding that the IRS's revocation of ULC's tax-exempt status violated both branches of §362(a)(1). Appendix p. 53. Both the District Court and the Ninth Circuit erroneously failed to acknowledge, however, that this also required -- due to the substantial overlap among §362(a)'s subsections intended by Congress -- a finding that the stay was violated under §362(a)(6) as well. Appendix pp. 14-60, 50.

An act in the nature of commencing or continuing a proceeding "to recover a claim against the debtor" under the second branch of §362(a)(1) is, by definition, also an "act to . . . recover a claim against the debtor" under §362(a)(6). Appendix pp. 67-68. Moreover, acts falling within §362(a)(1)(ii) and §362(a)(6) are also invariably, by definition, pecuniary in nature in that both provisions involve the recovery of a "claim" against the debtor. "Claim" is defined in § 101(5) of the Bankruptcy Code to include an asserted "right to payment."[6] Thus, "claims" by their very

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[6]The IRS is deemed an "adverse claimant" entity under the Bankruptcy Code. Phelps v. United States, 421 U.S. 330, 334 (1975). This is contrary to the Ninth Circuit's opinion below that the IRS is a welfare agency under §362(b)(4). Indeed, no case

definition are pecuniary in nature. It necessarily follows that §362(b)(4)'s police or regulatory power exception to the automatic stay -- which does not apply to pecuniary acts -- cannot apply to acts which simultaneously fall within §362(a)(6) and the second branch of §362(a)(1). Section 362(b)(4) is limited to §362(a)(1)'s first branch.

As fully briefed by Petitioner below, the IRS's revocation of its tax-exempt status was without question a pecuniary act. It was an integral part of the Internal Revenue Code's comprehensive income tax assessment and collection procedures. As illustrated in Exhibits A and B lodged herewith, the revocation was merely one of many consecutive and interlocking steps the IRS must take along its administrative pathway in order to assess and collect a tax. The comprehensive nature of the administrative assessment process was acknowledged by the Ninth Circuit in Delpit, 18 F.3d at 770, whereas the comprehensive nature of the collection process has been acknowledged by this Court in United States v. Whiting Pools, 462 U.S. 198, 210-11 (1983), and in United States v. National Bank of Commerce, 472 U.S. 713, 720-21 (1985). As to the assessment process, the Ninth Circuit in Delpit stated:

An appeal from a Tax Court judgment

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authority has been cited in the proceedings below for the proposition that the revocation of tax-exempt status is a welfare function.

concerning an alleged tax deficiency on the part of a debtor is a "continuation" of an administrative proceeding "against the debtor" within the first clause of Section 362(a)(1). The IRS has established a **comprehensive income tax assessment procedure** that begins with an audit and wends its way through the federal courts, including the Court of Appeals, the final potential step being a denial of certiorari or a judgment in favor of one party or the other by the Supreme Court of the United States. See IRS Publication No. 556, Examination of Returns, Appeals Rights, and Claims for Refund, at 9 (1990).

Under the income tax assessment procedure, a taxpayer is barred from petitioning the Tax Court until he has first participated in a number of administrative proceedings that are initiated "against" him. These procedures **include an audit**, a meeting with a revenue agent and a supervisor, a 30-day letter ("Preliminary Notice"), formal proceedings before the IRS Appeals Division, and a 90-day letter ("Notice of Deficiency"). These proceedings may continue with the taxpayer's request to the Tax Court to remove or reduce

> the deficiency assessment and, next, an appeal by one party or the other to the Court of Appeals.
>
> . . . [T]he appeal from the Tax Court's judgment is simply a "continuation" of the comprehensive income tax assessment procedure -- which is initiated by IRS administrative proceedings "against" the taxpayer. Accordingly, we hold that the automatic stay provisions of Section 362(a)(1) apply to such appeals. [Emphasis added].

Where a church is involved, the above-quoted "audit" is labeled a "church tax inquiry." Congress has placed severe restrictions on the ability of the IRS to audit churches. See 26 U.S.C. § 7611, and Exhibit B lodged herewith. Once a church tax inquiry has taken place, a necessary subsequent step in the IRS's administrative assessment process is the revocation of the church's tax-exempt status. When a church's tax exemption is revoked, a notice of revocation is issued which includes a demand for income tax returns (as received by Petitioner herein on or about January 8, 1991). As this Court is aware, our federal income tax system is one of self-assessment. When a taxpayer files a return, the IRS becomes entitled to assess the amount of tax shown thereon. 26 U.S.C. § 6201(a)(1). It therefore necessarily follows that when the IRS revoked ULC's tax-exempt status herein, it was making

a demand for the payment of money -- an unquestionably pecuniary act under §362(a)(6) and §362(a)(1)(ii)! Thus, the police or regulatory power exception to the automatic stay clearly did not apply to the IRS's revocation of ULC's tax-exempt status herein.

Moreover, at a more general level it is clear that actions taken by a governmental unit which do not attempt to protect the health and safety of the public, but rather protect a pecuniary interest, are not be excepted from the automatic stay under §362 (b)(4). Nonetheless, at least three distinct formulations of a test to meet the §362(b)(4) exception have arisen among several of the circuits.

As noted in Lazar, the narrow formulation taken by the Courts of Appeals for the First and Sixth circuits only allows the §362(b)(4) exception to the automatic stay to apply in limited circumstances where the government is seeking to protect public health and is not seeking to protect any pecuniary interest.

This formulation is evidenced in Ward v. Commissioner, 847 F.2d 291 (6th Cir. 1988). Ward involved a bankruptcy court ruling that proceedings by the State of Tennessee to fix civil penalties were not within the police power exception to the automatic stay of §362. Id. at p. 293. The Sixth Circuit vacated the ruling of the bankruptcy court and found that the state's actions were not "an action primarily designed to protect a pecuniary interest." Id. at p. 296. The court found that instead of furthering any

pecuniary interest, the primary purpose of the hearing that had been stayed by the bankruptcy court was to determine whether or to what extent the Tennessee Water Quality Control Act was violated so as to review the damages and penalties assessed by the Commissioner in light of those violations. Id. The Court found this was a regulatory action in the purest sense. This formulation of a §362(b)(4) standard takes the name "pecuniary purpose" test.

Similarly situated is the rule formulated by the First Circuit Court of Appeals in Corporacion de Servicios Medicos Hospitalarios de Fajardo v. Mora, 805 F.2d 440 (1st Cir. 1986). In Corporacion, the court considered the issue as a case of first impression. There, the bankruptcy court enjoined administrative proceedings by a state agency to revoke or suspend the debtor's license to operate a hospital, and in effect, terminate the debtor's contracts to provide government services for hire. Id. at p. 442. The district court affirmed the bankruptcy court, and on appeal the Department of Health claimed that the action to enforce its contract rights qualified under the §362(b)(4) exception.

The First Circuit Court of Appeals evaluated the case as one of first impression, citing both the plain wording of the statute as well as the legislative history accorded §362(b)(4). Id. at 444-45. The Court concluded that "It is apparent from the legislative history, however, that Congress intended the Section 362(b)(4) exception to apply exclusively to actions enforcing generally applicable regulatory laws governing the

behavior of debtors." Id. at 445.

In affirming the stay, the First Circuit stated its formulation of a narrow rule for §362(b)(4): "Nor has appellant cited any cases holding that actions by a governmental agency to enforce contracted rights, even if related to the agency's general regulatory power are exempt from the automatic stay." Id. at 445. The First Circuit, in following the legislative history, thus chose not to accept the state's characterization of its contract action as an exercise of its police or regulatory powers. The court instead chose to follow the congressional directive to give section 362(b)(4) a narrow construction! Id. at 447.

Other circuits, however, have formulated quite different standards from the same statute's plain wording and legislative history. The Eighth Circuit has taken a broader approach in its formulation of a standard for §362(b)(4). circumstances. In U.S. v. Commonwealth Co., 913 F.2d 518, 524-25 (8th Cir. 1990), the government sought a relief from the automatic stay to pursue an action against corporate debtors under the False Claims Act. The court rejected the bankruptcy court's view that §362(b)(4) applied only to actions to protect public health or safety. Id. at 521. The court found that as a general matter, §362(b)(4) does not include governmental actions that would result in a pecuniary advantage to the government vis-a-vis other creditors of the debtor's estate. Id. at 523. The court thus created the second, "pecuniary advantage" formulaic construction of §362(b)(4)

following the same plain wording of the statute and the same congressional intent. Id. at 523. This Eighth Circuit rule provides a balance where, as long as there is no direct pecuniary advantage to the government, the §362(b)(4) exception will be allowed.

Finally, in the decision at hand, while certainly cognizant of the split of authority among the circuits, the Ninth Circuit has formulated a new and broader standard for applying §362(b)(4) -- a "solely" pecuniary test. 128 F.3d at 1297, 1299; Appendix pp. 10, 14. In creating an exception for §362 (b)(4) even broader than the Eighth Circuit's formulation, the Ninth Circuit now requires that actions by a governmental unit be excepted from the automatic stay unless they are pursued solely to advance a pecuniary interest of the governmental unit. Id. Thus, the Ninth Circuit has created an exception in the Bankruptcy Code that effectively swallows several of §362(a)'s overlapping subsections.

The foregoing inconsistency among the circuits with respect to §362(b)(4) requires a clear and guided settlement by this Court.

2. The Ninth Circuit's opinion below is in conflict with this Court's Whiting Pools decision, as well as the plain meaning and legislative history of §362(b)(4), which unequivocally indicate that Congress intended the section to be the narrowest of exceptions to the automatic stay.

As indicated above, the §362(b)(4) police or regulatory power exception to the automatic stay was "intended to be given a narrow construction" and was not intended by Congress "to apply to actions by a governmental unit to protect a pecuniary interest in property of the debtor or property of the estate." 124 Cong.Rec.H 11089 (daily ed. Sept. 28, 1978), *reprinted* in 1978 U.S.C.C.A.N. 5787, 6444-45; 124 Cong. Rec. S 17406 (daily ed. October 6, 1978) *reprinted* in 1978 U.S.C.C.A.N. 5787, 6505, 6573; Also see In re Pizza of Hawaii, Inc., 12 B.R. 796 (Bkrtcy.D. Haw. 1981) [§362(b)(4) nonapplicable to state's failure to renew liquor license for nonpayment of taxes]; In re Golden Plan of California, Inc., 37 B.R. 167 (Bkrtcy.E.D. Cal. 1984) [California Franchise Tax Board's revocation of corporate powers for nonpayment of taxes not excepted from the automatic stay under §362(b)(4)]. As Petitioner briefed and argued extensively in the Ninth Circuit below, however, Respondent was attempting to do just that when it purported to revoke Petitioner's tax-exempt status in its January 8, 1991, letter.

The Ninth Circuit's Bankruptcy Appellate Panel has

noted in Thomassen v. Division of Medical Quality Assurance, 15 B.R. 907, 909, 910 (9th Cir. BAP 1981) that a government's exercise of otherwise valid police or regulatory power is to be categorized as "pecuniary," and hence outside the scope of §362(b)(4), so long as the purpose of the exercise of that power is pecuniary in nature:

> . . . [G]overnmental units cannot, by an exercise of their police or regulatory powers, subvert the relief afforded by the federal bankruptcy laws. When they seek to do so for a pecuniary purpose, they are automatically stayed, notwithstanding the exception found at 11 U.S.C. §362(b)(4).

Id. at 909.

Thus, the central inquiry under §362(b)(4) should focus upon whether the government's specific purpose in taking any given action is pecuniary in nature -- even if the action is taken pursuant to what can otherwise be characterized as valid police or regulatory powers. On the facts of the present case, then, even if the IRS's revocation of ULC's tax exempt status can properly be described as the exercise of police or regulatory powers, this is entirely irrelevant and §362(b)(4) does not apply if the IRS's intention behind the revocation was pecuniary in nature.

Here, the record below unequivocally establishes that the IRS's actions were motivated by pecuniary intentions. Of foremost importance is the IRS's status as a creditor in ULC's

Chapter 11 bankruptcy proceeding -- a creditor which filed a proof of claim in the Bankruptcy Court in an amount which (as amended) exceeded $6,000,000 (not including interest to date). It would be hard to conceive of an interest more pecuniary in nature than this.[7]

By revoking ULC's tax exempt status and demanding the filing of corporate income tax returns, the IRS was acting in its capacity as a creditor, with the overriding (and painfully obvious) intention of strengthening its claimed entitlement to the value of its monetary claim within the context of ULC's bankruptcy proceeding. As fully briefed by ULC in the proceedings below, the revocation, if valid, had the effect under the tax law of creating immediate tax liability for ULC under 26 U.S.C. §11 where none previously existed. If corporate tax returns had been filed by ULC, this would have further strengthened the IRS's monetary claim by removing a barrier to the liability's assessment. 26 U.S.C. §6201(a)(1). Clearly, then, the IRS acted with the requisite pecuniary intention, as contemplated by Congress, necessary to remove its revocation action from §362(b)(4).[8]

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[7] As indicated above, "Claim" under the Bankruptcy Code is defined to include any asserted "right to payment." §101(5). Any creditor is the holder of a claim. §101(10).

[8]Even without regard to Respondent's particular intention in revoking ULC's tax-exempt status herein, it is important to point out at a more general level that the granting of a tax exemption is just one of many tax subsidies granted by Congress to taxpayers in

In addition to conflicting with the intention of Congress, the Ninth Circuit's opinion also conflicts with the plain language and meaning of §§362(a) and (b)(4)as indicated above. The language of §362(a)(1) broadly stays any proceeding "against the debtor" or to "recover a claim against the debtor." Appendix p. 67. Section 362(b)(4)'s police or regulatory power exception to this provision, in contrast, narrowly excepts from the automatic stay certain exercises of a government's police or regulatory power. Appendix p. 69. Nowhere in the statute (or in §362(b)(4)'s legislative history) is the word "solely" used to describe the nature of the governmental pecuniary interest necessary to avoid falling within the §362(b)(4) exception. Thus, the Ninth Circuit's new "solely" pecuniary test is contrary to both the plain language of the statute and the statutes's legislative history. Moreover, the Ninth Circuit's new "solely" pecuniary test effectively inverts the intended statutory scheme by construing the §362(a)(1) stay provision narrowly and the

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the Internal Revenue Code. Other such subsidies include: (1) The ability of a corporation to make a "Subchapter S" election under 26 U.S.C. §1362 to avoid the corporate-level income tax; and, (2) the exclusion from gross income of municipal bond interest, etc. under 26 U.S.C. §103. All such tax subsidies are pecuniary in nature. Moreover, whenever the IRS disallows an item of credit or deduction, or whenever it disallows a taxpayer's election to take advantage of a particular tax subsidy, it is acting with the pecuniary intention of collecting revenue.

§362(b)(4) exception broadly so that the exception eviscerates the rule. This is clearly inappropriate, as a court cannot insert new wording in or re-write the language of a statute. See Connecticut Nat'l. Bank v. Germain, 112 S.Ct. 1146, 1149 (1992); Rake v. Wade, 113 S.Ct. 2187, 2191-2192 (1993); McNeil v. U.S., 113 S.Ct. 1980, 1983 (1993); Mertens v. Hewitt Assoc., 113 S.Ct. 2063, 2070 (1993); Sale v. Haitian Centers Counsel, Inc., 113 S.Ct. 2549, 2557 (1993).

Moreover, as indicated above, the Ninth Circuit in Delpit v. Commissioner, 18 F.3d 768 (9th Cir. 1994) has acknowledged that there are two distinct branches in §362(a)(1). The first branch generally stays proceedings "against" the debtor, whereas the second branch generally stays proceedings "to recover a claim" against the debtor. 18 F.3d at 770. Both Delpit and the statute's plain wording make it clear that §362(b)(4) is to be strictly limited to §362(a)(1)'s first branch, as the language in §362(a)(1)'s second branch is identical to the language used in §362(a)(6).[9] Because here

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[9]§362(b)(4) on its face only applies to acts which are stayed under §362(a)(1). Appendix p. 69. Delpit makes it clear, however, that Congress intended there to be substantial overlap among §362(a)'s various subsections so that the automatic stay would apply to virtually any conceivable act that could be taken by creditors of a bankrupt debtor. 18 F.3d at 772. Accordingly, it is consistent with both the plain language of §362 as well as Congress' intent that an act in the nature of commencing or continuing a proceeding "to recover a claim against the debtor"

the District Court below held that IRS's revocation of ULC's tax exempt status fell within both branches of §362(a)(1), Appendix p. 53, (this holding was not reviewed by the Ninth Circuit on appeal), §362(b)(4) does not apply to the revocation.[10]

It should also be emphasized that the Ninth Circuit's improper construction of §362(b)(4) effectively converts Congress' power to tax under Art. I, §8 of the U.S. Constitution into a public welfare function and entirely ignores that the primary purpose of the taxing power is to raise revenue. Title 26 of the U.S. Code is the "Internal Revenue Code," not the "Internal Public Health, Safety, and Welfare Code."

Finally, based upon the foregoing, the Ninth Circuit's opinion below is in conflict with this Court's decision in United States v. Whiting Pools, 462 U.S. at 209, where this Court stated:

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under the second branch of §362(a)(1) must also be an "act to . . . recover a claim against the debtor" under §362(a)(6). §362(b)(4) therefore does not apply to actions falling within the second branch of §362(a)(1).

[10]It should be noted that the Ninth Circuit's decision also has the effect of adding the word "solely" to §362(a)(1)(ii) and §362(a)(6) in a way which substantially narrows each of these provisions. Under the Ninth Circuit's construction, these provisions only apply to actions and/or proceedings to recover "of soley pecuniary" claims against the debtor.

> "Nothing in the Bankruptcy Code or its legislative history indicates that Congress intended a special exception for the tax collector in the form of an exclusion from the estate of property seized to satisfy a lien."

Significantly, Whiting Pools involved a situation where the IRS had "moved in the Bankruptcy Court for a declaration that the automatic stay provision of the Bankruptcy Code, §362(a), [was] inapplicable." Id. at 201. As the above quote amply illustrates, however, this Court appropriately rejected the IRS's plea for a special, judicially-created exception to the automatic stay not contemplated by Congress. This Court concluded that there was "no reason why a different result should obtain where the IRS is the creditor." Id. at 209.

In Whiting Pools, the IRS had seized the debtor's assets which were subject to a tax lien prior to the bankruptcy petition. Relief from stay to further pursue tax collection--a pecuniary purpose--was denied because the property was subject to a turnover order under §542(a). Id.

Here, the Ninth Circuit's opinion below is in direct conflict with Whiting Pools in that the Ninth Circuit effectively allowed the IRS to create its own judicial exception to the automatic stay by enlarging §362(b)(4) far beyond the parameters contemplated by Congress and required by the statute's plain meaning. Moreover, the Ninth Circuit allowed the IRS to do so to pursue tax assessment, which is just as pecuniary in nature as the collection at issue

in Whiting Pools. Id. While the IRS's revocation of ULC's tax-exempt status might not be barred by the automatic stay under current law under a different exception to the automatic stay,[11] we urge upon this Court that substantial damage tc §362(b)(4) has already been done. What was originally intended as the narrowest of exceptions to the automatic stay has now been broadened by the Ninth Circuit into a vast exception which eviscerates the rule in the event that any governmental unit is a creditor in a bankruptcy proceeding. Under the Ninth Circuit's new formulation of §362(b)(4), creditors which are governmental units will never be subject to the automatic stay except in the rarest of cases where their interests are solely pecuniary in nature. 128 F.3d at 1297; Appendix p. 10.[12]

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[11]Current §362(b)(9)(D), which does not apply to the instant case as it was enacted after this case was brought, now allows the IRS to take all actions up to the last discrete act of assessment. The section excepts from the automatic stay, inter alia, "the making of an assessment for any tax."

[12]The Ninth Circuit also erroneously applied the "public policy" test in its opinion below. The Ninth Circuit erroneously stated in its opinion that the public policy test "distinguishes between **governmental actions** that effectuate public policy and those that adjudicate private rights." [Emphasis added]. The correct quote, taken from National Labor Relations Board v. Edward Cooper Painting, Inc., 804 F.2d 934, 942 (6th Cir. 1986), and repeated in National Labor Relations Board v. Continental Hagen Corporation,

3. **The Ninth Circuit, in affirming the District Court, has sanctioned both the District Court's and the Bankruptcy Court's departure from the usual course of judicial proceedings to such an extent as to call for an exercise of this Court's supervisory power. This is because the Bankruptcy Court, as the trier of fact, failed to even consider the issue of whether Respondent was collaterally estopped from contesting Petitioner ULC's tax-exempt status, whereas the District Court (sitting as an appellate court) improperly made a determination of changed circumstances, hence precluding the application of collateral estoppel, based solely upon unproven assertions to that effect made by Respondent and the IRS.**

In 1974, the U.S. District Court for the Eastern District of California granted Petitioner ULC its tax-exempt status:

"It is therefore ordered that the [Universal Life

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932 F.2d 828, 833 (9th Cir. 1991), should read that the public policy test "distinguishes between **proceedings** that effectuate public policy and those that adjudicate private rights." The difference is of monumental significance, with the point being that a proceeding brought to vindicate private rights does not, by definition, involve governmental action. In re Dan Hixson Chevrolet Co., 12 B.R. 917 (Bkrtcy.Ct.N.D.Tex 1981); In re D.M. Barber, Inc. v. Valverde, 13 B.R. 962 (Bkrtcy.N.D.Tex. 1981).

> Church, Inc.] be and is entitled to a Federal Tax Exemption . . ."

Universal Life Church, Inc. v. United States, 372 F.Supp. 770, 776 (E.D.Cal. 1974). In 1987, the Claims Court subsequently revoked ULC's tax-exempt status, but limited the revocation to the fiscal years 1978-1981. Universal Life Church, Inc., v. United States, 13 Cl.Ct. 567 (1987). In contrast, the IRS's purported revocation of Petitioner's tax-exempt status at issue herein, which was limited to the fiscal years 1982-1985, was never based upon any judicial finding by an Article III court that the circumstances giving rise to its initial grant of tax-exempt status in 1974 by the U.S. District Court for the Eastern District of California had changed. Accordingly, ULC has continuously maintained under the separation of powers doctrine that Respondent is collaterally estopped from revoking its tax-exempt status in the absence of a judicial finding of changed circumstances warranting such a revocation.

The Bankruptcy Court altogether ignored this crucial issue, whereas the District Court (sitting as an appellate court) made a determination of changed circumstances based solely upon assertions made by Respondent and the IRS:

> "[t]he IRS decision to revoke tax-exempt status for fiscal years 1982-1985 was based on at least six distinct and different grounds . . (Appellant's Excerpt at 40). These factors were found to exist during the 1982-1985 time

> period, approximately eight to ten years after the court's decision on tax-exempt status. Because the dispositive facts in each case were different, collateral estoppel does not bar the IRS from revoking ULC's tax-exempt status for the time period 1982-1985."

Appendix pp. 61-62.

In making the above determination of changed circumstances, the District Court, without question, departed from the usual course of judicial proceedings to an extent requiring an exercise of this Court's supervisory power. As the above quote illustrates, the District Court's determination of changed circumstances was based solely upon its citation to "Appellant's Excerpt at 40." The cited excerpt, in turn, is nothing more than a page from the IRS's January 8, 1991, revocation letter which sets forth in a cursory fashion the reasons for the revocation.

Clearly what the District Court should have done was remand the case to the trial court, i.e., the Bankruptcy Court, for a determination by the trier of fact as to whether or not the circumstances giving rise to ULC's initial grant of tax-exempt status by the U.S. District Court for the Eastern District of California had changed. Indeed, the operational requirements for tax-exempt organizations are fact intensive in nature and must be determined on an annual basis by the trier of fact.[13]

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[13]See 26 U.S.C. §501(c)(3); 26 C.F.R. §1.501(c)(3)-1(c).

Rather than remanding the case to the Bankruptcy Court for judicial findings with respect to the Internal Revenue Code's operational requirements for 26 U.S.C. §501(c)(3) organizations, the District Court instead chose to rely upon the unproven assertions of one party to the lawsuit, i.e. Respondent and the IRS, as a substitute for such findings. While Petitioner raised this substantial, unwarranted departure from the normal course of judicial proceedings in the Ninth Circuit below, the Ninth Circuit failed to adequately adress this issue. Accordingly, the Ninth Circuit has itself sanctioned the lower courts' departure from the normal course of judicial proceedings to an extent requiring this Court to exercise its supervisory powers by granting the instant Petition for Writ of Certiorari.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully Submitted

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re:	)	
UNIVERSAL LIFE	)	
CHURCH, INC.,	)	
a California	)	
non-profit corporation,	)	
Debtor.	)	No. 96-15122 &
	)	96-15123
UNIVERSAL LIFE	)	D.C. No.CV-93-05863-OWW
CHURCH, INC.,	)	
a California	)	ORDER
non-profit corporation,	)	
Appellant,	)	
v.	)	
	)	
UNITED STATES	)	
OF AMERICA,	)	
Appellee.	)	
	)	

Before: A.WALLACE TASHIMA and SIDNEY R. THOMAS, Circuit Judges, and JOHN W. SEDWICK,* U.S. District Judge.

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc. The full

court has been advised of the suggestion for an enrehearing, and no Judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b). The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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*The Honorable John W. Sedwick, United States District Judge for the District of Alaska, sitting by designation.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re:	)
UNIVERSAL LIFE	)
CHURCH, INC.,	)
a California	)
non-profit corporation,	)
Debtor.	) No. 96-15122 &
	) 96-15123
UNIVERSAL LIFE	)D.C. No.CV-93-05863-OWW
CHURCH, INC.,	)
a California	) ORDER AND
non-profit corporation,	) AMENDED
Appellant,	) OPINION
v.	)
	)
UNITED STATES	)
OF AMERICA,	)
Appellee.	)
	)

Appellee.Appeals from the United States District Court
for the Eastern District of California
Oliver W. Wanger, District Judge, Presiding

Argued and Submitted

August 14, 1997--San Francisco, California
Filed October 6, 1997
Amended December 30, 1997

Before: A. Wallace Tashima and Sidney R. Thomas, Circuit Judges, and John W. Sedwick,* U.S. District Judge.
Opinion by Judge Thomas

COUNSEL

Edward O.C. Ord, Ord & Norman, San Francisco, California, for the appellant. G. Patrick Jennings and Gary D. Gray, United States Department of Justice, Washington, D.C., for the appellee.

ORDER

The United States has moved the Court to modify its opinion. Neither the Federal Rules of Appellate Procedure, nor the Ninth Circuit Rules provide for such a motion. Accordingly,we construe it as a petition for rehearing. Thus construed, the motion is denied. However, the Court sua sponte amends the opinion as follows:

(1) Deleting the first paragraph of section II, including footnote 1, and inserting the following in lieu thereof: "The Church makes a persuasive argument that under *Delpit v. Commissioner*, 18 F.3d 768 (9th Cir. 1994), the IRS's 1991

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*The Honorable John W. Sedwick, United States District Judge for theDistrict of Alaska, sitting by designation.

revocation of the Church's tax exempt status violated the automatic stay provided by 11 U.S.C. S 362(a). However, we need not reach this issue because the IRS's revocation of the Church's tax exempt status clearly falls within an exception to section 362(a). We thus begin our analysis by assuming, without deciding, that the IRS violated the automatic stay in this case."

(2) Sequentially renumbering the remaining footnotes in the opinion.

(3) Substituting "362(b)(4)" for "362(a)(4)" in paragraph 12 of section II.

(4) Substituting "the district court's affirmation of the bankruptcy court" for "the district court's grant of summary judgment" in the last paragraph of section II.

With these amendments, the opinion dated October 6, 1997 is amended.

OPINION

THOMAS, Circuit Judge:

A religious organization seeks to have an Internal Revenue Service ("IRS") revocation of its tax-exempt status declared void as violative of bankruptcy's automatic stay. We hold that the IRS's administrative actions were permissible under the police and regulatory power exception to the

automatic stay and affirm.

I.

Universal Life Church, Inc. ("Church"), is a California nonprofit corporation. The IRS denied the Church's application for tax exempt status in 1969 and again in 1970 on the ground that the Church had engaged in activities outside the religious activities contemplated by I.R.C. S 501(c)(3). After paying the taxes and interest due for fiscal year ending April30, 1969, the Church brought a suit for refund and prevailed. *Universal Life Church, Inc. v. United States*, 372 F. Supp. 770(E.D. Cal. 1974). The district court found that the contested activities (ordination of ministers, granting of church charters, and issuance of honorary doctorates) were not a substantial enough part of the Church's activities to justify denying the exemption. *Id.* at 775-76.

In 1984, the IRS revoked the Church's tax exempt statusfor the fiscal years ending April 30, 1978 through April 30,1981. The Church brought a declaratory judgment action in the Court of Federal Claims with respect to its tax-exempt status for these years. The Court of Federal Claims upheld the revocation on the ground that the Church had not been operated solely for tax-exempt purposes as required by I.R.C.S 501(c)(3); it gave tax advice to its ministers and failed to control the non-exempt activities of its congregations. *Universal Life Church, Inc. v. United States*, 13 Cl. Ct. 567(1987), *aff'd*, 862 F.2d 321 (Fed. Cir. 1988).

The Church then commenced an action in the Tax Court for a redetermination of the deficiencies asserted by the

Commissioner of Internal Revenue ("Commissioner") for these years. *Universal Life Church, Inc. v. Commissioner*, Tax Ct. dkt. no.8288-85. The parties reached a settlement, and the Tax Court entered a judgment based on the settlement determining the deficiencies against the Church for fiscal years 1978-1980.

The IRS began investigating the Church's tax exempt status for fiscal years ending April 30, 1982 through April 30, 1985. The Church filed a voluntary petition for bankruptcy under Chapter 11 of the Bankruptcy Code on November 30, 1989. The Church then commenced an adversary proceeding under 11 U.S.C. § 505 to determine its federal and state liabilitiesfor certain taxable periods between 1978 and 1990. In its complaint, the Church maintained that it was exempt from federal income taxes for the fiscal years ending April 30,1978 through April 30, 1990.

The IRS revoked the Church's tax exempt status on January 8, 1991 for fiscal years ending April 30, 1982 through April 30, 1985. The revocation letter further stated that the Church was required to file federal income tax returns for these years, pursuant to I.R.C. S 6012. The total amount of taxes, with interest, is estimated by the Church to be in excess of six million dollars.

On July 20, 1993, the Church filed a motion in the adversary proceeding seeking a declaratory judgment that the IRS's revocation of the Church's tax exempt status was void as a violation of the automatic stay provided by 11 U.S.C.S 362(a). The Church also sought damages pursuant to

11U.S.C. S 362(h).

The bankruptcy court denied the motion, holding that even if the revocation was an act that normally would have beenstayed, it came within the exception under section 362(b)(4)for acts to enforce police or regulatory powers. The bankruptcy court also ordered the Church to file tax returns for the disputed tax years. The district court affirmed. The district court concluded that although revocation violated the automatic stay provision of section 362(a)(1), it fell within the exception provided by section 362(b)(4).

On appeal, a motions panel denied the IRS's motion to dismiss the appeal for lack of finality, and denied the Church's motion for stay of the returns order. We consolidated all pending issues for consideration on the merits.

II.

The Church makes a persuasive argument that under *Delpit v. Commissioner*, 18 F.3d 768 (9th Cir. 1994), the IRS's 1991 revocation of the Church's tax exempt status violated the automatic stay provided by 11 U.S.C. S 362(a). However, we need not reach this issue because the IRS's revocation of the Church's tax exempt status clearly falls within an exception to section 362(a). We thus begin our analysis by assuming, without deciding, that the IRS violated the automatic stay in this case.

[1] Assuming a stay violation, our first inquiry must be whether the IRS's administrative actions fall within an exception to the automatic stay. The exception at issue in this case,section 362(b)(4), provides an automatic stay

exception for "the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power." This section permits government to initiate or continue an action under its police or regulatory powers free of the restrictions of the automatic stay. 3 Collier on Bankruptcy ¶ 362.05[5][b], at 362-58 (15th ed. 1996). The theory of this exception is because bankruptcy should not be "a haven for wrongdoers," the automatic stay should not prevent governmental regulatory, police and criminal actions from proceeding. 3 Collier on Bankruptcy ¶ 362.05[5][a], at 362-54 (15th ed. 1996).

[2] The phrase "police or regulatory power" refers to the enforcement of laws affecting health, welfare, morals and safety, but not regulatory laws that directly conflict with the control of the res or property by the bankruptcy court. *Hillis Motors, Inc. v. Hawaii Auto. Dealers' Ass'n*, 997 F.2d 581,591 (9th Cir. 1993). The section 362(b)(4) exception has been applied in a variety of contexts, including labor law enforcement, *NLRB v. Twin Cities Electric*, 907 F.2d 108 (9th Cir.1990), state bar disciplinary proceedings, *Wade v. State Bar of Arizona*, 948 F.2d 1122, 1123-24 (9th Cir. 1990) and employment discrimination actions brought by the Equal Employment Opportunity Commission, *EEOC v. Hall'sMotor Transit Co.*, 789 F.2d 1011, 1014 (3d Cir. 1986).

[3] There are two tests for determining whether agency actions fit within the section 362(b)(4) exception: (1) the"pecuniary purpose" test and (2) the "public policy" test.

NLRB v. Continental Hagen Corp., 932 F.2d 828, 833 (9thCir. 1991). Under the pecuniary purpose test, the court determines whether the government action relates primarily to the protection of the government's pecuniary interest in the debtor's property or to matters of public safety and welfare. *Id.* If the government action is pursued solely to advance a pecuniary interest of the governmental unit, the stay will be imposed. *Thomassen v. Division of Med. Quality Assurance (In re Thomassen)*, 15 B.R. 907, 909 (9th Cir. BAP 1981).

[4] The public policy test "distinguishes between government actions that effectuate public policy and those that adjudicate private rights." *Continental Hagen*, 932 F.2d at 833 (quoting *NLRB v. Edward Cooper Painting, Inc.*, 804 F.2d 934, 942 (6th Cir. 1996)).

[5] The question in this case is whether an IRS letter revoking the tax exempt status of a religious corporation meets either test. We hold it meets both. The district court found,and we agree, that the revocation was an exercise of the IRS'spolice or regulatory power because revocation promotes public welfare by assuring the public and potential donors that contributions will be used for legitimate charitable purposes. Indeed, "[c]haritable exemptions are justified on the basis that the exempt entity confers a public benefit -- a benefit which the society or the community may not itself choose or be able to provide . . . ." *Bob Jones Univ. v. United States*, 461 U.S.574, 591 (1983). "When the Government grants exemptions or allows deductions all taxpayers are affected; the very fact of the exemption or deduction for the donor

means that other taxpayers can be said to be indirect and vicarious 'donors'." *Id.*

[6] Thus, determination that an organization may not meet the standards for tax exempt status in itself serves a general public welfare purpose beyond any pecuniary application in a particular case. As the district court noted in this case, "[t]his activity may be characterized as a type of fraud detection, assuring potential donors that the organization will not use their contributions for personal profit, but for the charitable purposes encouraged by law." Fraud detection is consistent with the purpose of the exception. Detection of fraud had been sustained as a valid basis for invoking the exception even when there is an additional pecuniary interest at stake. For example, a civil suit brought pursuant to the Federal False Claims Act is sufficient to satisfy the section 362(b)(4) exception. *United States v. Commonwealth Cos. (In Re Common-wealth Cos.)*, 913 F.2d 518 (8th Cir. 1990).

The legislative history is similarly in accord with this view:

> Paragraph (4) excepts commencement or continuation of actions and proceedings by governmental units to enforce police or regulatory powers. Thus, where a governmental unit is suing a debtor to prevent or stop violation of fraud, environmental protection, consumer protection, safety, or similar police or regulatory laws, or

> attempting to fix damages for violation of such a law, the action or proceeding is not stayed under the automatic stay.

S. Rep. No. 95-989 at 52 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5838; H.R. Rep. No. 95-595 at 343(1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6299.[1]

[7] This conclusion is consistent with our previously expressed view that revocation serves a law enforcement function. As we noted in *Church of Scientology Int'l v. IRS*, 995 F.2d 916, 919 (9th Cir. 1993): "[W]e are convinced thatthe EO [Exempt Organizations branch of the IRS] performs a law enforcement function by enforcing the provision of the federal tax code that relate to qualification for

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[1]We note that the parties disagree about the extent to which this revocation letter has informed the public about the Church's tax exempt status. The record is unclear and we conclude we need not determine the specific impact in this case. In examining qualification for a 11 U.S.C. § 362(b)(4) exception, the critical inquiry is the policy underlying issuance of a revocation letter; that is, whether charitable status revocation in itself serves purely pecuniary purposes or not. Thus, the question of whether the informational function has been served in this particular case is not relevant. We conclude as a general matter that when the IRS revokes the tax exempt status of organizations which do not meet the 501(c)(3) requirements, it serves a public trust function in assuring the public that 501(c)(3) taxexempt status is conferred and retained only by organizations engaged inappropriately charitable functions.

tax exempt status." *See Lewis v. IRS*, 823 F.2d 375, 379 (9th Cir. 1987)("The IRS has the requisite law enforcement mandate and the affidavits presented in this case establish a rational nexus between enforcement of a federal law and the document for which the Freedom of Information Act exemption is claimed.").[2] As the district court correctly observed, "[r]evocation of tax-exempt status implements a public policy function regulating the government's interest in advancing the policies underlying the charitable purposes exemptions provided by Congress."

[8] We reject the Church's position that the IRS must have no pecuniary motive at all to fall within section 362(b)(4). There is nothing in the statute that requires the IRS's action to serve only welfare purposes before it qualifies for theexception. Other circuits have found to the contrary of the Church's position as well. "In accordance with the clearly expressed congressional intent, those circuits addressing the question have concluded that S 362(b)(4) does not exclude agovernmental action to obtain the entry of a money judgment for a past violation of the law simply because money damages are the only relief sought in the action." *Commonwealth Cos.*,

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[2]We decline the Church's invitation to limit the import of these observations to FOIA cases. As noted by the *Church of Scientology* court, the inquiry was directed broadly to " 'an examination of the agency itself to determine whether the agency may exercise a law enforcement function.' " 995 F.2d at 919 (quoting *Church of Scientology v. United States Dep't of the Army*, 611 F.2d 738, 748 (9th Cir. 1979)).

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[9] Our holding in *Delpit* is not to the contrary. As we noted earlier, *Delpit* involved the application of section362(a), not exceptions to the section. If we were to consider *Delpit* in the exception context, it would provide an example of the application of the exception. In *Delpit*, we held that an appeal constituted a continuation of the entire tax assessment and collection proceeding and was stayed. Thus, *Delpit* involved an attempt by the government to advance a purely pecuniary interest without any additional public policy purpose. By contrast, the tax exempt status revocation letter here has a public policy purpose and, by itself has no pecuniary effect. The estate will not be affected and the Church has a speedy and adequate remedy by which to challenge the IRS action in the section 505 adversary proceeding.

The Church argues that section 362(b)(4) is limited by its language to the first part of section 362(b)(1) and does not except the second part of section 362(b)(1) which prohibits actions "to recover a claim against the debtor that arose before

the commencement of the case." The Church then argues that the second branch of section 362(b)(1) describes the IRS's actions against it, and therefore a provision of the stay existsfor which no exception is provided. However, a proper construction of section 362(b)(1) does not support this position.

The second branch of section 362(a)(1) uses as its subject "action or proceeding against the debtor" from the first branch. In other words, section 362(a)(1) prohibits actions against the debtor that were or could have been commenced before the petition for bankruptcy was filed, and section362(a)(1) prohibits actions to recover a claim against the debtor that arose before the petition for bankruptcy was filed. Thus, the section 362(b)(4) exemption includes both, because it is targeted at actions or proceedings against the debtor.[3]

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[3]Neither *Pizza of Hawaii, Inc. v. Department of Taxation (In re Pizzaof Hawaii, Inc.)*, 12 B.R. 796 (Bankr.D. Haw. 1981), nor *Coben v. Lebrun (In re Golden Plan of California, Inc.)*, 37 B.R. 167 (Bankr.E.D. Cal.1984), cases cited by the Church, is contrary to our decision in this case. *Pizza of Hawaii*, involved the state Liquor Commission's refusal to renew a debtor's liquor license without payment of taxes, interest, and penalties owed. *Pizza* held that the state's action did not qualify for the section 362(b)(4) exception because it "does not in any way deal with the preservation of the health, safety or welfare of the public." 12 B.R. at 799. In *Coben*, the state Franchise Tax Board suspended the corporate powers ofthe debtor entity for nonpayment of taxes. *Coben* held that the section362(b)(4) exception was unavailable because "the primary purpose of Cal.Rev. & Tax Code S 23301 is the protection

Because the issuance of a letter revoking tax exempt status falls within the section 362(b)(4) exception, the district court's affirmance of the bankruptcy court on this issue was appropriate.

III.

The Church argues that the IRS's position in this case is intension with the position it took in *IRS v. Sulmeyer (In re Grand Chevrolet)*, 153 B.R. (C.D. Cal. 1993), and thus the IRS should be judicially estopped from arguing the inconsistent position.

We reject the Church's argument. The jurisdictional issues in Sulmeyer are different from the ones here, such that no inconsistency exists.[4] The Church also argues that because a federal district court determined that it was entitled to tax exempt status for the fiscal year ending April 30, 1969, the IRS is collaterally estopped from arguing that the Church isnot entitled to tax exempt status for the years in question in

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of a pecuniary interest. . . and not the protection of the public health or safety . . . ." 37 B.R.at 170 (quotation omitted). In the instant appeal, by contrast, the IRS'saction protects a public trust in the 501(c)(3) certification; no such public trust was at stake in either *Pizza of Hawaii* or *Coben*.

[4]In *Sulmeyer*, the IRS argued that an actual controversy must be at issue before the bankruptcy court has jurisdiction to consider a section 505 motion. Here, it is undisputed that an actual controversy exists.

this suit.

[10] The applicability of collateral estoppel is determined by: (1) whether the issues presented are in substance the same in the present and prior litigation; (2) whether controlling facts or legal principles have changed significantly since the prior judgment; and (3) whether other special circumstances warrant an exception to the normal rules of preclusion. *Richey v. IRS*, 9 F.3d 1407, 1410 (9th Cir. 1993). As thedistrict court correctly determined, the issues presented here are not in substance the same as those presented in the prior litigation in question[5], and a controlling fact has changed significantly since the prior judgment.[6]

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[5]The district court's determination in *Universal Life Church, Inc. v.United States*, 372 F. Supp. 770 (E.D. Cal. 1974) was based on its finding that the Church's ordination of ministers, its granting of church charters,and its issuance of Honorary Doctor of Divinity titles were not substantial activities which did not further any religious purpose. *Id.* at 775-76. The IRS's decision to revoke the tax-exempt status was based on the following, different grounds: the net earnings of the Church inured to the benefit of private individuals; the Church provided advice to individuals on the purported tax benefits available to ministers of the Church; and the Church furthered a substantial nonexempt purpose in administering and operating the receipts and disbursements program to its members and congregations.

[6]"In 1984, the Internal Revenue Service (IRS) revoked [the Church's] tax exempt status as a corporation organized and operated exclusively for religious purposes, for the fiscal years ending April 30, 1978, through April 30, 1981. That revocation has been upheld in the federal courts." *Carter v. United States*, 973 F.2d 1479, 1483

Thus, collateral estoppel does not apply.

IV.

[11] We also find no error in the transfer of one of the district court appeals to another judge for consolidation. The district judges correctly determined that the two cases were sufficiently related to permit consolidation. The Church asserts that by this process the government impermissibly "selected" the district judge who would hear the appeals inviolation of due process. This claim is meritless because the government did not "select" the district judge who heard the appeals. The assignment was made pursuant to local rule by the court, not the government. The district court's action was appropriate: the two appeals originated out of the same bankruptcy matter and involved the same parties.

V.

[12] The Church challenges the bankruptcy court's order compelling it to file tax returns. However, the district court did not rule on this issue. In assessing whether we have appellate jurisdiction over a bankruptcy appeal, we must examine finality at two levels: (1) whether the bankruptcy court decision was final and (2) whether the decision of the district court or the Bankruptcy Appellate Panel decision was final. *King v. Stanton (In Re Stanton)*, 766 F.2d 1283, 1285 (9th Cir.1985). Absent a final order from the district court, we have no jurisdiction to consider this appeal and therefore

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(9th Cir. 1992).

must dismiss it.[7] 28 U.S.C. § 158(d). Dismissal of this portion of the appeal makes it unnecessary to consider whether the order should bestayed pending appeal, as argued by the Church.

CONCLUSION

The district court correctly determined that 11 U.S.C.S 362(b) provided an exception to the automatic stay in this instance, allowing the IRS to issue a letter revoking the Church's tax-exempt status. Because the district court did not decide whether the bankruptcy court had the power under 11U.S.C. S 105 to order the Church to file a federal income tax return, we have no jurisdiction to consider that issue on appeal. None of the Church's remaining issues on appeal have merit.

AFFIRMED IN PART AND DISMISSED IN PART.

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[7]A motions panel denied the IRS's motion to dismiss for lack of finality. "While we give deference to motions panel decisions made in the course of the same appeal, we have an independent duty to decide whether we have jurisdiction." *Fuller v. M.G. Jewelry*, 950 F.2d 1437, 1441 (9thCir. 1991).

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re:	)
UNIVERSAL LIFE	)
CHURCH, INC.,	)
a California	)
non-profit corporation,	)
Debtor.	) No. 96-15122
	)
UNIVERSAL LIFE	) D.C. No.CV-93-05863-OWW
CHURCH, INC.,	)
a California	)
non-profit corporation,	)
Appellant,	)
v.	)
UNITED STATES	)
OF AMERICA,	)
Appellee.	)
	)

In re:	)
UNIVERSAL LIFE	)
CHURCH, INC.,	)
a California	)
non-profit corporation,	)
Debtor.	)

UNIVERSAL LIFE CHURCH, INC., a California non-profit corporation, *Appellant,*	)	No. 96-15123
	)	D.C. No.CV-93-05893-OWW
	)	OPINION
v.	)	
UNITED STATES OF AMERICA, *Appellee.*	)	

Appellee.Appeals from the United States District Court
for the Eastern District of California
Oliver W. Wanger, District Judge, Presiding

Argued and Submitted
August 14, 1997--San Francisco, California
Filed October 6, 1997

Before: A. Wallace Tashima and Sidney R. Thomas,
Circuit Judges, and John W. Sedwick,* U.S. District Judge.
Opinion by Judge Thomas

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*The Honorable John W. Sedwick, United States District Judge for theDistrict of Alaska, sitting by designation.

COUNSEL

Edward O.C. Ord, Ord & Norman, San Francisco, California, for the appellant. G. Patrick Jennings and Gary D. Gray, United States Department of Justice, Washington, D.C., for the appellee.

OPINION

THOMAS, Circuit Judge:

A religious organization seeks to have an Internal Revenue Service ("IRS") revocation of its tax-exempt status declared void as violative of bankruptcy's automatic stay. We hold that the IRS's administrative actions were permissible under the police and regulatory power exception to the automatic stay and affirm.

I.

Universal Life Church, Inc. ("Church"), is a California nonprofit corporation. The IRS denied the Church's application for tax exempt status in 1969 and again in 1970 on the ground that the Church had engaged in activities outside the religious activities contemplated by I.R.C. S 501(c)(3). After paying the taxes and interest due for fiscal year ending April30, 1969, the Church brought a suit for refund and prevailed. *Universal Life Church, Inc. v. United States*, 372 F. Supp. 770(E.D. Cal. 1974). The district court found that the contested activities (ordination of ministers, granting of church charters, and issuance of honorary doctorates) were not a substantial enough part of the Church's

activities to justify denying the exemption. *Id.* at 775-76.

In 1984, the IRS revoked the Church's tax exempt statusfor the fiscal years ending April 30, 1978 through April 30,1981. The Church brought a declaratory judgment action in the Court of Federal Claims with respect to its tax-exempt status for these years. The Court of Federal Claims upheld the revocation on the ground that the Church had not been operated solely for tax-exempt purposes as required by I.R.C.S 501(c)(3); it gave tax advice to its ministers and failed to control the non-exempt activities of its congregations. *Universal Life Church, Inc. v. United States*, 13 Cl. Ct. 567(1987), *aff'd*, 862 F.2d 321 (Fed. Cir. 1988).

The Church then commenced an action in the Tax Court for a redetermination of the deficiencies asserted by the Commissioner of Internal Revenue ("Commissioner") for these years. *Universal Life Church, Inc. v. Commissioner*, Tax Ct. dkt. no.8288-85. The parties reached a settlement, and the Tax Court entered a judgment based on the settlement determining the deficiencies against the Church for fiscal years 1978-1980.

The IRS began investigating the Church's tax exempt status for fiscal years ending April 30, 1982 through April 30, 1985. The Church filed a voluntary petition for bankruptcy under Chapter 11 of the Bankruptcy Code on November 30, 1989. The Church then commenced an adversary proceeding under 11 U.S.C. § 505 to determine its federal and state liabilitiesfor certain taxable periods between 1978 and 1990. In its complaint, the Church maintained that it was exempt

from federal income taxes for the fiscal years ending April 30,1978 through April 30, 1990.

The IRS revoked the Church's tax exempt status on January 8, 1991 for fiscal years ending April 30, 1982 through April 30, 1985. The revocation letter further stated that the Church was required to file federal income tax returns for these years, pursuant to I.R.C. S 6012. The total amount of taxes, with interest, is estimated by the Church to be in excess of six million dollars.

On July 20, 1993, the Church filed a motion in the adversary proceeding seeking a declaratory judgment that the IRS's revocation of the Church's tax exempt status was void as a violation of the automatic stay provided by 11 U.S.C.S 362(a). The Church also sought damages pursuant to 11U.S.C. S 362(h).

The bankruptcy court denied the motion, holding that even if the revocation was an act that normally would have beenstayed, it came within the exception under section 362(b)(4)for acts to enforce police or regulatory powers. The bankruptcy court also ordered the Church to file tax returns for the disputed tax years. The district court affirmed. The district court concluded that although revocation violated the automatic stay provision of section 362(a)(1), it fell within the exception provided by section 362(b)(4).

On appeal, a motions panel denied the IRS's motion to dismiss the appeal for lack of finality, and denied the Church's motion for stay of the returns order. We consolidated all pending issues for consideration on the merits.

II.

The IRS did not cross-appeal the district court's determination that revocation violated the automatic stay, 11 U.S.C.S 362(a)(1). It also did not cross-appeal the district court's finding that the Anti-Injunction Act, 26 U.S.C.S 7421(a), didnot bar the Church's action. Accordingly, these issues are not before us and we do not consider their merit. We thus begin our analysis by assuming, without deciding, that the IRS violated the automatic stay in this case.[1]

[1] Assuming a stay violation, our first inquiry must be whether the IRS's administrative actions fall within an exception to the automatic stay. The exception at issue in this case,section 362(b)(4), provides an automatic stay exception for "the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power." This section permits government to initiate or continue an action under its police or regulatory powers free of the restrictions of the automatic stay. 3 Collier on Bankruptcy ¶ 362.05[5][b], at 362-58 (15th ed. 1996). The theory of this exception is because bankruptcy should not be "a haven for wrongdoers," the automatic stay should not prevent governmental regulatory, police and criminal actions from proceeding. 3

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[1]The IRS's waiver also obviates our need to discuss directly the ramifications of *Delpit v. Commissioner*, 18 F.3d 768 (9th Cir. 1994), because Delpit's inquiry was limited to a construction of the scope 11 U.S.C.S 362(a) as applied to IRS tax enforcement proceedings.

Collier on Bankruptcy ¶ 362.05[5][a]. at 362-54 (15th ed. 1996).

[2] The phrase "police or regulatory power" refers to the enforcement of laws affecting health. welfare, morals and safety, but not regulatory laws that directly conflict with the control of the res or property by the bankruptcy court. *Hillis Motors, Inc. v. Hawaii Auto. Dealers' Ass'n*, 997 F.2d 581,591 (9th Cir. 1993). The section 362(b)(4) exception has been applied in a variety of contexts, including labor law enforcement, *NLRB v. Twin Cities Electric*, 907 F.2d 108 (9th Cir.1990), state bar disciplinary proceedings, *Wade v. State Bar of Arizona*, 948 F.2d 1122, 1123-24 (9th Cir. 1990) and employment discrimination actions brought by the Equal Employment Opportunity Commission, *EEOC v. Hall'sMotor Transit Co.*, 789 F.2d 1011, 1014 (3d Cir. 1986).

[3] There are two tests for determining whether agency actions fit within the section 362(b)(4) exception: (1) the"pecuniary purpose" test and (2) the "public policy" test. *NLRB v. Continental Hagen Corp.*, 932 F.2d 828, 833 (9thCir. 1991). Under the pecuniary purpose test, the court determines whether the government action relates primarily to the protection of the government's pecuniary interest in the debtor's property or to matters of public safety and welfare. *Id.* If the government action is pursued solely to advance a pecuniary interest of the governmental unit, the stay will be imposed. *Thomassen v. Division of Med. Quality Assurance (In re Thomassen)*, 15 B.R. 907, 909 (9th Cir. BAP 1981).

[4] The public policy test "distinguishes between

government actions that effectuate public policy and those that adjudicate private rights." *Continental Hagen*, 932 F.2d at 833 (quoting *NLRB v. Edward Cooper Painting, Inc.*, 804 F.2d 934, 942 (6th Cir. 1996)).

[5] The question in this case is whether an IRS letter revoking the tax exempt status of a religious corporation meets either test. We hold it meets both. The district court found,and we agree, that the revocation was an exercise of the IRS'spolice or regulatory power because revocation promotes public welfare by assuring the public and potential donors that contributions will be used for legitimate charitable purposes. Indeed, "[c]haritable exemptions are justified on the basis that the exempt entity confers a public benefit -- a benefit which the society or the community may not itself choose or be able to provide . . . ." *Bob Jones Univ. v. United States*, 461 U.S.574, 591 (1983). "When the Government grants exemptions or allows deductions all taxpayers are affected; the very fact of the exemption or deduction for the donor means that other taxpayers can be said to be indirect and vicarious`donors'." *Id.*

[6] Thus, determination that an organization may not meet the standards for tax exempt status in itself serves a general public welfare purpose beyond any pecuniary application in a particular case. As the district court noted in this case, "[t]his activity may be characterized as a type of fraud detection, assuring potential donors that the organization will not use their contributions for personal profit, but for the charitable purposes encouraged by law."

Fraud detection is consistent with the purpose of the exception. Detection of fraud had been sustained as a valid basis for invoking the exception even when there is an additional pecuniary interest at stake. For example, a civil suit brought pursuant to the Federal False Claims Act is sufficient to satisfy the section 362(b)(4) exception. *United States v. Commonwealth Cos. (In Re Common-wealth Cos.)*, 913 F.2d 518 (8th Cir. 1990).

The legislative history is similarly in accord with this view:

> Paragraph (4) excepts commencement or continuation of actions and proceedings by governmental units to enforce police or regulatory powers. Thus, where a governmental unit is suing a debtor to prevent or stop violation of fraud, environmental protection, consumer protection, safety, or similar police or regulatory laws, or attempting to fix damages for violation of such a law, the action or proceeding is not stayed under the automatic stay.

S. Rep. No. 95-989 at 52 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5838; H.R. Rep. No. 95-595 at 343(1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6299.[2]

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[2]We note that the parties disagree about the extent to which this revocation letter has informed the public about the Church's tax exempt status. The record is unclear and we conclude we need not

[7] This conclusion is consistent with our previously expressed view that revocation serves a law enforcement function. As we noted in *Church of Scientology Int'l v. IRS*, 995 F.2d 916, 919 (9th Cir. 1993): "[W]e are convinced thatthe EO [Exempt Organizations branch of the IRS] performs a law enforcement function by enforcing the provision of the federal tax code that relate to qualification for tax exempt status." *See Lewis v. IRS*, 823 F.2d 375, 379 (9th Cir. 1987)("The IRS has the requisite law enforcement mandate and the affidavits presented in this case establish a rational nexus between enforcement of a federal law and the document for which the Freedom of Information Act exemption is claimed.").[3] As the district court correctly

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determine the specific impact in this case. In examining qualification for a 11 U.S.C. § 362(b)(4) exception, the critical inquiry is the policy underlying issuance of a revocation letter; that is, whether charitable status revocation in itself serves purely pecuniary purposes or not. Thus, the question of whether the informational function has been served in this particular case is not relevant. We conclude as a general matter that when the IRS revokes the tax exempt status of organizations which do not meet the 501(c)(3) requirements, it serves a public trust function in assuring the public that 501(c)(3) taxexempt status is conferred and retained only by organizations engaged inappropriately charitable functions.

[3]We decline the Church's invitation to limit the import of these observations to FOIA cases. As noted by the *Church of Scientology* court, the inquiry was directed broadly to " 'an examination of the agency itself to determine whether the agency

observed, "[r]evocation of tax-exempt status implements a public policy function regulating the government's interest in advancing the policies underlying the charitable purposes exemptions provided by Congress."

[8] We reject the Church's position that the IRS must have no pecuniary motive at all to fall within section 362(b)(4). There is nothing in the statute that requires the IRS's action to serve only welfare purposes before it qualifies for theexception. Other circuits have found to the contrary of the Church's position as well. "In accordance with the clearly expressed congressional intent, those circuits addressing the question have concluded that S 362(b)(4) does not exclude agovernmental action to obtain the entry of a money judgment for a past violation of the law simply because money damages are the only relief sought in the action." *Commonwealth Cos.*, 913 F.2d at 522-23 (citing *United States v. Nicolet, Inc.*, 857F.2d 202, 207-09 (3d Cir. 1988); *EEOC v. McLean Trucking Co.*, 834 F.2d 398, 400-02 (4th Cir. 1987)). Indeed, most government actions which fall under this exemption have some pecuniary component, particularly those associated with fraud detection. This does not abrogate their police power function. Only if the action is pursued "solely to advance a pecuniary interest of the governmental unit" will the automatic stay bar it. *Thomassen*, 15 B.R. at 909.

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Because the issuance of a letter revoking tax exempt status falls within the section 362(b)(4) exception, the district court's grant of summary judgment on this issue was appropriate.

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[4]Neither *Pizza of Hawaii, Inc. v. Department of Taxation (In re Pizzaof Hawaii, Inc.)*, 12 B.R. 796 (Bankr.D. Haw. 1981), nor *Coben v. Lebrun (In re Golden Plan of California, Inc.)*, 37 B.R. 167 (Bankr.E.D. Cal.1984), cases cited by the Church, is contrary to our decision in this case. *Pizza of Hawaii*, involved the state Liquor Commission's refusal to renew a debtor's liquor license without payment of taxes, interest, and penalties owed. *Pizza* held that the state's action did not qualify for the section 362(b)(4) exception because it "does not in any way deal with the preservation of the health, safety or welfare of the public." 12 B.R. at 799. In *Coben*, the state Franchise Tax Board suspended the corporate powers ofthe debtor entity for nonpayment of taxes. *Coben* held that the section362(b)(4) exception was unavailable because "the primary purpose of Cal.Rev. & Tax Code S 23301 is the protection of a pecuniary interest. . . and not the protection of the public health or safety . . . ." 37 B.R.at 170 (quotation omitted). In the instant appeal, by contrast, the IRS'saction protects a public trust in the 501(c)(3) certification; no such public trust was at stake in either *Pizza of Hawaii* or *Coben*.

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The Church argues that the IRS's position in this case is intension with the position it took in *IRS v. Sulmeyer (In re Grand Chevrolet)*, 153 B.R. (C.D. Cal. 1993), and thus the IRS should be judicially estopped from arguing the inconsistent position.

We reject the Church's argument. The jurisdictional issues in Sulmeyer are different from the ones here, such that no inconsistency exists.[5] The Church also argues that because a federal district court determined that it was entitled to tax exempt status for the fiscal year ending April 30, 1969, the IRS is collaterally estopped from arguing that the Church isnot entitled to tax exempt status for the years in question in this suit.

[10] The applicability of collateral estoppel is determined by: (1) whether the issues presented are in substance the same in the present and prior litigation; (2) whether controlling facts or legal principles have changed significantly since the prior judgment; and (3) whether other special circumstances warrant an exception to the normal rules of preclusion. *Richey v. IRS*, 9 F.3d 1407, 1410 (9th Cir. 1993). As the district court correctly determined, the issues presented here are not in substance the same as those

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[5]In *Sulmeyer*, the IRS argued that an actual controversy must be at issue before the bankruptcy court has jurisdiction to consider a section 505 motion. Here, it is undisputed that an actual controversy exists.

presented in the prior litigation in question[6], and a controlling fact has changed significantly since the prior judgment.[7] Thus, collateral estoppel does not apply.

IV.

[11] We also find no error in the transfer of one of the district court appeals to another judge for consolidation. The district judges correctly determined that the two cases were sufficiently related to permit consolidation. The Church asserts that by this process the government impermissibly "selected" the district judge who would hear the appeals inviolation of due process. This claim is meritless because

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[7]"In 1984, the Internal Revenue Service (IRS) revoked [the Church's] tax exempt status as a corporation organized and operated exclusively for religious purposes, for the fiscal years ending April 30, 1978, through April 30, 1981. That revocation has been upheld in the federal courts." *Carter v. United States*, 973 F.2d 1479, 1483 (9th Cir. 1992).

the government did not "select" the district judge who heard the appeals. The assignment was made pursuant to local rule by the court, not the government. The district court's action was appropriate: the two appeals originated out of the same bankruptcy matter and involved the same parties.

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[12] The Church challenges the bankruptcy court's order compelling it to file tax returns. However, the district court did not rule on this issue. In assessing whether we have appellate jurisdiction over a bankruptcy appeal, we must examine finality at two levels: (1) whether the bankruptcy court decision was final and (2) whether the decision of the district court or the Bankruptcy Appellate Panel decision was final. *King v. Stanton (In Re Stanton)*, 766 F.2d 1283, 1285 (9th Cir.1985). Absent a final order from the district court, we have no jurisdiction to consider this appeal and therefore must dismiss it.[8] 28 U.S.C. § 158(d). Dismissal of this portion of the appeal makes it unnecessary to consider whether the order should bestayed pending appeal, as argued by the Church.

CONCLUSION

The district court correctly determined that 11 U.S.C.S 362(b) provided an exception to the automatic stay in this

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[8]A motions panel denied the IRS's motion to dismiss for lack of finality. "While we give deference to motions panel decisions made in the course of the same appeal, we have an independent duty to decide whether we have jurisdiction." *Fuller v. M.G. Jewelry*, 950 F.2d 1437, 1441 (9thCir. 1991).

instance, allowing the IRS to issue a letter revoking the Church's tax-exempt status. Because the district court did not decide whether the bankruptcy court had the power under 11U.S.C. S 105 to order the Church to file a federal income tax return, we have no jurisdiction to consider that issue on appeal. None of the Church's remaining issues on appeal have merit.

AFFIRMED IN PART AND DISMISSED IN PART.

In the Matter of UNIVERSAL LIFE CHURCH, INC., a California Non-Profit Corporation, Debtor.

UNIVERSAL LIFE CHURCH, INC., a California Non-Profit Corporation, Appellant,

v.

UNITED STATES of America, et al., Appellees.

Nos. CV-F-93-5893-OWW, CV-F-93-5863-OWW.

United States District Court, E.D. California.

Nov. 6, 1995.

Chapter 11 debtor moved for damages from Internal Revenue Service (IRS) for alleged violation of automatic stay by revoking debtor's tax-exempt status for three previous years. The Bankruptcy Court denied debtor's motion, ordered debtor to file returns for those years, and denied debtor's motion for stay pending appeal. Debtor appealed, and moved for stay in District Court. The District Court, Wanger, J., held that: (1) debtor's excessively long and untimely reply briefs would be accepted because IRS did not object; (2) Anti-Injunction Act did not preclude determination of whether revocation of tax exempt status violated automatic stay; (3) revocation was enforcement of governmental police or regulatory power, activity not covered by automatic stay; and

(4) denial of stay pending appeal was warranted. Affirmed.

MEMORANDUM OPINION AND ORDER
RE: BANKRUPTCY APPEAL AND MOTION FOR
STAY PENDING APPEAL

WANGER, District Judge.

1. INTRODUCTION

Universal Life Church ("ULC") appeals the November 19, 1993 order of the bankruptcy court denying ULC's motion for damages for the Internal Revenue Service's ("IRS") alleged violation of the automatic stay of 11 U.S.C. § 362.[1] The bankruptcy court held that the IRS did not violate the automatic stay provisions of 11 U.S.C. § 362(a) when it revoked ULC's tax-exempt status, but even if it did violate § 362(a), the revocation was authorized under the § 362(b)(4) exception to the automatic stay.[1] The bankruptcy court heald that the IRS did not violate the automatic stay provisoins of 11 U.S.C. § 362(a) when it revoked ULC's tax-exmpt status, but even if it did violate § 362(a), the revocation was authorized under the § 362(b)(4) exception to thle automatice

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[1]11 U.S.C. § 362 was amended by Congress on October 22, 1994. This case commenced on July 20, 1993 when ULC filed the instant motion with the Bankruptcy Court. Because the 1994 amendments are inapplicable to cases commenced prior to October 22, 1994, Act of October 22, 1994, P.L. 103-394, Title VII, § 702(b), 108 Stat. 4150, this action is governed by I I U.S.C. § 362 as it stood before the 1994 amendments.

stay.

ULC also moves for a stay pending appeal of the August 31, 1993 bankruptcy court order to file corporate income tax returns for the fiscal years 1982-1985. The bankruptcy court has previously denied ULC's request for stay. The United States has requested a briefing schedule for the appeal of the August 31, 1993 order.

II. BACKGROUND

ULC filed a Chapter 11 bankruptcy petition oil November 29, 1989. By a letter dated January 8, 1991, the IRS revoked ULC's tax-exempt status under 26 U.S.C. § 501(c)(3) for the fiscal years ending April 30, 1982 through April 30, 1985. (Appellant's Excerpt of Record at 40-41 [hereinafter Appellant's Excerpt].) The revocation letter also informed ULC that it was required to file federal income tax returns for those years. (Appellant's Excerpt at 41.)

An amended proof of claim for accrued but unassessed federal employment income taxes was filed in the bankruptcy court on October 21, 1992. No post bankruptcy petition claim for any taxes or assessments has been made. Nor has any notice of federal tax lien been filed. The government claim for income, employment, and unemployment taxes is an unsecured priority tax claim.

ULC filed a motion in the bankruptcy court on July 20, 1993, requesting both an order that the revocation of tax-exempt status was void is a violation of the automatic stay provisions of 11 U.S.C. § 362(a), and damages for such

violation under 11 U.S.C. § 362(h).[2] (Appellant's Excerpt at 13-23.) The bankruptcy court orally denied the motion on August 30, 1993, (Appellant's Excerpt at 257-58), and issued its first amended written order denving the motion on November 19, 1993 (Appellant's Excerpt at 274-75). ULC appealed the order on November 22, 1993. By an order dated November 8, 1994, this court determined that the bankruptcy court's order was final for purposes of appeal to tile district court under 28 U.S.C. § 158(a).

On June 1, 1993, the United States moved to compel ULC to file corporate income tax returns for the 1982-1985 fiscal years. (Report and Recommendation to United States District Court Concerning Finality of Appealed Order, dated April 6, 1995, at 13 [hereinafter Rep. & Rec.].) On August 31, 1993, file bankruptcy court ordered ULC to file such tax returns. (Appellant's Excerpt at 269-71.) The bankruptcy court refused to reconsider its decision and denied ULC's request, for a stay pending appeal to the district court on November 9, 1993. ULC then filed a notice of appeal and a motion for stay pending appeal with the district court. By order of January 31, 1094, the district court remanded the matter to the bankruptcy court to determine whether the August 31, 1993 decision was final or interlocutory. On

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[2]Section 362(h) states in relevant part, "[a]n individual injured by any willful violation of a stay provided by this section shall recover actual damages. . . ." A corporation may not recover damages under § 362(h). *In re Goodman*, 991F.2d 613, 619-20 (9th Cir. 1993).1993.

April 6, 1995, the bankruptcy court recommended that the August 31, 1993 decision be considered final for purposes of appeal. On June 8, 1995, ULC again moved the district court to stay the order to file tax returns pending its appeal of that order in the district court. In its motion, UI C asserts that tile bankruptcy court reaffirmed its denial of the stay on May 24, 1995.

II. STANDARD OF REVIEW

[1, 2] A district court reviews *de novo* a bankruptcy court's conclusions of law, including matters of jurisdiction. *Matter of Lockard,* 884 F.2d 1171, 1174 (9th Cir.1989). Findings of fact by the bankruptcy judge shall not, be disturbed unless they are clearly erroneous. Fed.R.Bank.P. 8013.

[3] When a bankruptcy court has ruled on the issue of a stay of its order pending appeal the district court, sitting as all appellate Court, reviews that decision for abuse of discretion. *In re Wymer,* 5 B.R. 802, 807 9th Cir. BAP 1980).

IV. DISCUSSION

A. *Procedural Requirements*

[4,5] The Bankruptcy Rules dictate the length of briefs submitted on appeal from the bankruptcy court, unless the court or local rules issue orders to the contrary. Fed. R.Bank.P. 8010(c). This court has a standing order limiting opening briefs and memoranda to 25 pages each and reply

briefs to 10 pages, unless prior leave of court seven days before the filing date is obtained. It is unclear whether counsel in this action received notice of the standing order before filing their briefs. Giving counsel the benefit of the doubt, Bankruptcy Rule 8010(c) will apply here, which limits opening briefs to 50 pages and reply briefs to 25 pages.

ULC's reply brief on the violation of the automatic stay appeal is 43 pages long. ULC has included 11 pages of additional argument in Appendix G. ULC did not obtain leave to file a brief in excess of the page limits.

ULC has also submitted an excessively long and untimely reply on the motion to stay the order to file tax returns pending appeal. Though the Bankruptcy Rules make no specific provision regarding the length of motions for stay pending appeal, the court believes that an eight page opposition does not warrant a 32 page reply. Finally, Local Rule 230 requires parties to file replies to motions "[n]ot less than five (5) court days preceding the date of hearing." ULC's reply was filed on October 18, 1995, only three court days before the hearing date of October 23, 1995. Because the government does not object, the replies will be accepted.

B. Anti-Injunction Act

[6] ULC raises the issue of whether the Anti-Injunction Act deprives the court of subject matter jurisdiction to determine if the revocation of tax-exempt status was a violation of the automatic stay. ULC argued against application of the Anti-injunction Act in its opening brief because it anticipated that the United States would raise

the issue in its opposition brief. (Appellant's Opening Brief at 32.) The United States did not discuss the Anti-Injunction Act in its opposition brief. Because any federal court must determine whether it has jurisdiction to hear a case, applicability of the Anti-Injunction Act must be considered.

The issue was argued by both parties to the bankruptcy court, *(see* Appellant's Excerpt at 137-438, 152-56, 194-98, 214-20, 242-43), after the United States raised the Anti-Injunction Act in its opposition to ULC's motion in the bankruptcy court, claiming the Anti-Injunction Act prohibited an injunction against the IRS' revocation of tax-exempt status. (Appellant's Excerpt at 138.) ULC replied that it does not seek an injunction against revocation of its tax-exempt status, but rather damages for the alleged violation of the automatic stay caused by the revocation. (Appellant's Excerpt at 198.) The bankruptcy court emphasized in its oral decision on August 30, 1993, "All that's being decided today is whether or not the effort of the Internal Revenue Service by sending out its notice or letter of revocation violated the automatic stay of Section 362." (Appellant's Excerpt at 257.)

[7] The Anti-Injunction Act prohibits suits in any court "for the purpose of restraining the assessment or collection of any tax." 26 U.S.C. § 7421(a). The purpose of this language is "to protect the Government's need to assess and collect taxes as expeditiously as possible with a minimum of preenforcement judicial interference, 'and to require that the legal right to the disputed sums be determined in a suit for refund.'" *Bob Jones University v. Simon,* 416 U.S. 725, 736,

94 S.Ct. 2038, 2045, 40 L.Ed.2d 496 (1974) (quoting *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1, 7, 82 S.Ct. 1125, 1129, 8 L.Ed.2d 292 (1962)). The Supreme Court has ruled that an action seeking to enjoin the IRS from revoking tax-exempt status, or an action to compel reinstatement of tax-exempt status violates the Anti-Injunction Act because preventing the IRS from revoking tax-exempt status would necessarily preclude the collection of taxes. *Bob Jones*, 416 U.S. at 733, 94 S.Ct. at 2044 (1974) (recognizing that the "clash between the language of the Anti-Injunction Act and the desire of § 501(c)(3) organizations to block the Service from withdrawing [an exemption] has been resolved against the organizations in most cases"); *Alexander v. "Americans United" Inc.*, 416 U.S. 752, 94 S.Ct. 2053, 40 L.Ed.2d 518 (1974). The question here is whether declaring the revocation of tax-exempt status a violation of the automatic stay has the same effect as an injunction against revocation of tax-exempt status.

Bob Jones and *Alexander* did not involve taxpayers, in bankruptcy, and do not illuminate the interplay between the bankruptcy automatic stay and the Anti-Injunction Act. However, *Bob Jones* extensively analyzed the potential adverse economic effect on a tax-exempt organization which results from revocation of tax-exempt status. Two Courts of Appeals that have considered the interplay of the two Acts reach different results.

In *Bostwick v. United States*, *521* F.2d 7411 (8th Cir.1975), the court held the policies underlying the

Bankruptcy Act to rehabilitate and give the debtor motivation to lead a full and productive economic life override the government's need to assess and collect taxes dining bankruptcy. "We believe that the overriding policy of the Bankruptcy Act is the rehabilitation of the debtor and we are convinced that the Bankruptcy Court must have the power to enjoin assessment and/or collection of taxes in order to protect its jurisdiction...." Id, at 744. *Bostwick* involved an injunction to prevent collection of back taxes after the automatic stay had elapsed and a discharge order had been entered. The automatic stay was not at issue, and in any event, was not included in the Bankruptcy Act in its present format until 1978.

In re Heritage Church and Missionary Fellowship, 851 F.2d 104 (4th Cir.1988), reaches the opposite conclusion. In *Heritage,* the debtor sought an injunction against revocation of tax-exempt status. The court gave broad reach to the Anti-Injunction Act, and denied an injunction against IRS revocation of tax-exempt status, citing Bob Jones to show that an injunction against the revocation of tax-exempt status was a restraint on the assessment of taxes. *Id.* at 105. In contrast, the court found that 11 U.S.C. § 362(a)(6), providing an automatic stay of any "act to collect, assess, or recover" taxes, was narrow and did not apply to tax-exempt status revocation, because revocation of such status is "not an act to collect, assess, or recover a claim against a debtor that arose before commencement of the case," 11 U.S.C. § 362(a)(6), and is a non-covered preliminary step to assessment.

Heritage Village, 851 F.2d at *105.* The Fourth Circuit held "there is no express provision in the Bankruptcy Code indicating congressional intent that the Code supersede the Anti-Injunction Act." *Id.* (quoting *In re LaSalle Rolling Mills,* /lie., 832 F.2d 390, 394 (7th Cir.1987)).

Other courts have considered *Bostwick* but limited it to its specific facts, rather than rejecting its reasoning outright. For example, the lower court in *Heritage,* which was affirmed by the Fourth Circuit, offered a detailed discussion distinguishing its ease from the facts in *Bostwick* 87 B.R. 401 *(D.S.C.); aff'd,* 851 F.2d 104 (4th Cir.1988). The crucial difference was that the proposed revocation would have no immediate effect on the assessment of taxes against the debtor in *Heritage,* because the automatic stay provision of § 362(a)(6) would prohibit such assessment. *Id.* at 406. However, the revocation would cause taxes to be assessed against contributors to the debtor because they could no longer claim deductions for their contributions. *Id.* The court found that the bankruptcy court did not have the jurisdiction to enjoin assessment of taxes against the nondebtor contributors, and so it could not enjoin revocation of tax-exempt status. *Id.* at 406-07; *cf. In re American Bicycle Association,* 895 F.2d 1277 (9th Cir.1990) (holding Anti-Injunction Act precludes bankruptcy court from enjoining collection of tax penalty from nondebtor); *A to Z Welding and Manufacturing Co. v. United States,* 803 F.2d 932 (8th Cir.1986) (holding *Bostwick* does not apply to injunctions to restrain assessment of taxes against nondebtors).

Here, it is not apparent that the distinction between *Heritage* and *Bostwick is* applicable. One crucial difference lies in the time period of the revocation. In *Heritage,* the revocation was effective immediately, affecting the current tax returns of contributors to the debtor. Here, the revocation applies only to fiscal years 1982-1985. Because the I RS is prohibited from assessing taxes more than three years after the filing of a tax return for any particular year, 26 U.S.C. § 6501(a), it is unlikely that the revocation will affect the tax liability for 1982-1985 of any contributor to ULC. Accordingly, the revocation might have no effect on the assessment of taxes while the automatic stay is in place, and the Anti-Injunction Act would simply not come into play.

The Bankruptcy Court for the Southern District of California has applied *Bostwick* on at least two occasions. That court has found that it has "jurisdiction to enjoin the IRS from the assessment and collection of taxes despite the anti-injunction statute *if such activity interferes with the orderly administration of the estate or the rehabilitation of the debtor." In re Major Dynamics, Inc., 14* B.R. 969, 970 (Bankr.S.D.Cal.1981), *quoted in In re Martin, 150* B.R. 43 (Bankr.S.D.Cal. 1993). The automatic stay is designed toward that same end: "to effect an immediate freeze of the *status quo* by precluding and nullifying post-petition actions, judicial or nonjudicial, in nonbankruptcy fora against the debtor or affecting the property of the estate." *Hillis Motors, Inc. v. Hawaii Automobile Dealers Ass'n,* 997 F.2d *581, 585* (9th Cir.1993).

[8, 9] Both the district court and the court of appeals in *Heritage* recognized that the automatic stay prohibits the actual assessment and collection of taxes under § 362(a)(6). Thus, the specific rehabilitation purpose of the Bankruptcy Code takes precedence over the Anti-Injunction Act at least in the specific instances of tax assessment and collection. Under a parity of reasoning, the Bankruptcy Code should also take precedence over the Anti-Injunction Act in this case, because the revocation of tax-exempt status is recognized as a prerequisite to the assessment of taxes. *See Bob Jones, 416* U.S. it 731-32, 94 S.Ct. at 2043-44. The *Heritage* rationale that the automatic stay does not apply to such prerequisite acts, while the Anti-Injunction Act does, is unpersuasive. To hold that the Anti-Injunction Act prevents a court from enforcing an injunction against revocation of tax-exempt status, but does not prevent it from enforcing an injunction against the actual assessment or taxes because the Bankruptcy Code provisions prevail in that single instance, would promote neither the policies of the Anti-Injunction Act nor those of the Bankruptcy Code. In a bankruptcy case, the Anti-Injunction Act does not preclude determination of whether the revocation of tax-exempt status violates the automatic stay provision of § 362.

C. Automatic Stay Violation

The filing of a bankruptcy petition under Chapter 11 of the United States Code operates as a stay against any of the activities enumerated under 11 U.S.C. § 362(a) and not

excepted under 11 U.S.C. § 362(b).

1. Violation of § 362(a)

Though ULC argues that § 362 "as a whole" applies to prohibit the revocation of tax-exempt status, both ULC and the United States focus their arguments specifically on §§ 362(a)(1), (4), and (6). At oral argument, ULC also raised specifically §§ 362(a)(3), and (5). The government contends it has not violated the purpose of the automatic stay provision to halt collection activities outside the bankruptcy proceeding, because it has properly filed its claims in the bankruptcy proceeding and has not sought to create or perfect any tax lien.

[10-12] Section 362(a)(6) prohibits "any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under [Title 11]." Revocation of tax-exempt status is a prerequisite act of assessment of a tax. *See Bob Jones,* 416 U.S. at 731-32, 94 S.Ct. at 2043-44. *In re Heritage Village Church & Missionary Fellowship* holds that revocation is not an act of assessment. 87 B.R. 401, 403 (D.S.C.1988), *aff'd,* 851 F.2d 104 (4th Cir. 1988). Simply because the Anti-Injunction Act "applies not only to assessment or collection of a tax, but is equally applicable to activities leading up to, and culminating in, such assessment and collection," *see Blech v. United States,* 595 F.2d 462, 466 (9th Cir. 1979), does not make revocation an "act to collect, assess, or recover a claim [that arose pre-petition]." *Heritage Village,* 87 B.R. at 403. Revocation of tax-exempt status is not a formal distinct act that has the characteristics or

consequences of collection, assessment, or recovery of taxes. Section 362(a)(6) does not apply to the revocation.

[13,14] Section 362(a)(4) prohibits "any act to create, perfect, or enforce a lie against property of the estate." A tax lien upon property arises only after the IRS assesses a tax deficiency and makes a demand for payment. 26 U.S.C. § 6321. The lien is created immediately upon assessment. 26)U.S.C. § 6322. Enforcement of a tax lien would require a levy or judicial foreclosure. See 26 U.S.C. § 6331(a); 26 U.S.C. § 7403. There has been no action to create or enforce a tax lien because there has been no assessment of taxes nor any levy or judicial foreclosure proceedings instituted. Though the court has held that revocation of tax-exempt status is a prerequisite act of assessment, it is unclear whether it is also a prerequisiteact to create a lien. Section 362(a)(4) stays lien creation against property of the estate. The United States has disclaimed that it sought the status revocation to create a lien and does not contend it is entitled to secured creditor status for pre-petition tax claim,arising from the revocation. Under thesefacts, § 362(a)(4) does not stay the revocation.

Section 362(a)(5) stays "any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title." Under the facts here, the interpretation of § 362(a)(5) is essentially the same as under § 362(a)(4). The IRS has not sought a lien or secured priority based on a claim arising before the filing of

the petition. The stay of § 362(a)(5) does not bar the revocation.

[15, 16] Section § 362(a)(3) stays "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate." "The purpose of this provision is to prevent dismemberment of the estate." S.Rep. No. 989, 95th Cong., 2d Sess. 50 (1978), *reprinted in* U.S.C.C.A.N. 5787, 5836. Tax-exempt status is not a property right. *Heritage Village*, 87 B.R. at 405. Though the case that *Heritage* Village relied on in reaching this conclusion, *In re Braniff* Airways, Inc., 700 F.2d 9,15, 942 (5th Cir.1983) (holding that landing slots, allocated to airline by FAA were not property of debtor airline's estate but merely rules modifying airline's use of property), has been criticized, the *Heritage Village* holding is not weakened.

[17] Some courts have disagreed with *Braniff,* concluding that government regulation of the use of property through licenses or permits does not negate the existence of a property right in the debtor. *See, e.g., In re Horizon Air, Inc.,* 156 B.R. 369, 376-77 (N.D.N.Y.1993); *In re Ridgely Communications, Inc.,* 139 B.R. 374, 377-78 (Bankr. D.Md.1992); *In re Beker Indus. Corp.,* 57 B.R. 611, 622 (Bankr.S.D.N.Y.1986). Tax-exempt status is not a license or permit for tile use of property, as were the interests contemplated in the cases critical of *Braniff* and in *Braniff* itself. It is simply a classification for income and expense imposed by the IRS entitling the taxpayer to certain advantageous tax treatment. if tile status is not property, its

revocation is not an act to obtain possession of property of or from the estate. *Cf. Jordan v. Randolph Mills, Inc.*, 716 F.2d 1063, 1056 (4th Cir.1983). The possibility that revocation will affect the recharacterization of ULC income, which may be subject to assessment for unpaid taxes at some time in the future, i.e. by paving the way for a lien and collection of taxes, is not sufficient to constitute a violation of § 362(a)(3), particularly when no specific property of ULC is identified as tile subject of a request for possession or control. *See Board of Governors* v. *MCorp Financial, Inc., 502 U.S.* 32, 40, 112 S.Ct. 451), 46-1, 116 L.Ed.2d 358 (1991).

[18,19] Finally, § 362(a)(1) provides a prohibition against:

> "the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before tile commencement of tile case under this title."

The Ninth Circuit has interpreted this provision broadly, holding that the entire assessment procedure is an administrative proceeding that is stayed by § 362(a)(1). *Delpit v.Commissioner Internal Revenue Service,* 18 F.3d 768, 770-71 (9th Cir. 1994). *Delpit* held that the proceeding began with an audit of the taxpayer and continued through

litigation of tax liability in the federal courts. *Id*, at 770. Whether revocation of tax-exempt status was also a part of this administrative proceeding was not at issue in *Delpit*. The reasoning of *Delpit* is instructive. Each step in the administrative process leading to assessment and collection of additional taxes, including the revocation of tax-exempt status which begins the process, is the commencement or continuation of an administrative proceeding or other action to recover a claim against the debtor that arose before the commencement of the bankruptcy. Revocation of tax-exempt status violates the automatic stay provision of § 362(a)(1).

2. Exceptions to the Automatic Stay

a. § 362(b)(41)

[20-22] Section 362(b)(4) excepts from the automatic stay of § 362(a)(1) "the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power." 11 U.S.C. § 362(b)(4). Examples of such actions are "suing a debtor to prevent or stop violation of fraud, environmental protection, consumer protection, safety, or similar police or regulatory laws, or attempting to fix damages for violation of such law." H.R.Rep. 595, 95th Cong., 1st Sess. 342-43 (1977); S.Rep. No. 989, 95th Cong., 2d Sess. 51-52 (1978), *reprinted in* U.S.C.C.A.N. 5787, 5837, 5838, 5963, 6299. Actions which conflict directly "with the control of the res or property of the bankruptcy court" are not excepted from the stay. *Heritage Village,* 87 B.R. at 404; *Missouri v. United States Bankruptcy*

Court, 647 F.2d 768, 776 (8th Cir.1981), *cert. denied,* 454 U.S. 1162, 102 S.Ct. 1035, 71 L.Ed.2d 318 (1982). Section 362(b)(4) does not apply to actions pursued to advance a "pecuniary interest" of the governmental unit or its citizens. *In re, Thomassen,* 15 B.R. 907, 909 (9th Cir. BAP 1981); *In re Golden Plan of California, Inc.,* :37 B.R. 167, 170 n. 2 (Bankr.E.D.Cal.1984).

The district court in *Heritage Village* concluded that revocation of tax-exempt status was excepted from the automatic stay because it served a police or regulatory function. 87 B.R. at 404. The court found that the regulation and review of tax-exempt organizations "promotes the public welfare by assuring donors that their contributions will qualify for a charitable deduction and that the donee organization is a charitable one." *Id,* This activity may be characterized as a type of fraud detection, assuring potential donors that the organization will riot use their contributions for personal profit, but for the charitable purposes encouraged by law. The Ninth Circuit has recognized that the IRS, particularly the Exempt Organizations division which reviews tax-exempt status, exercises police powers. In an action concerning the Freedom of Information Act, the court found that the Exempt Organization division of the IRS "performs a law enforcement function by enforcing the provisions of the federal tax code that relate to qualification for tax exempt status." *Church of Scientology Int'l v. United States Internal Revenue Serv.,* 995 F.2d 916, 919 (9th Cir. 1993).

[23] Here, the IRS revoked tax-exempt status for

ULC because, *inter alia,* the church's earnings had inured to the benefit of private individuals. Though admittedly the revocation of tax-exempt status inevitably affects the pecuniary interests of United States citizens, all fraud prevention activities are linked to such pecuniary concerns. This does not deny their police function. Revocation of tax-exempt status implements, a police power function regulating the government's interest in advancing the policies underlying the charitable purposes exemptions provided by Congress.

ULC argues that § 362(b)(4) cannot be applicable in this case because it is indistinguishable from the situations in *In re Golden Plan of California,* 37 B.R. 167 (Bankr. E.D.Cal.1984), and *In re Pizza of Hawaii,* 12 B.R. 796 (Bankr.D.Haw.1981). These two cases held that the revocation of a corporate charter and withholding of renewal of a liquor license, respectively, for failure to pay taxes were not excepted from the automatic stay under § 362(b)(4) because such actions were for pecuniary purposes. *Golden Plan,* 37 B.R. at 170 n. 2; *Pizza of Hawaii.* 12 B.R. at 798-99. These cases are distinguishable from the present case, however, because the government in those cases acted solely to enforce its pecuniary interest in collecting taxes. Here, the IRS has revoked tax-exempt status, not with the sole aim to enforce the collection of taxes, but with the goal of assuring that funds not be used for noncharitable purposes and to protect the public from fraudulent charitable solicitations.

[24] Finally, ULC argues that § 362(b)(4) is only applicable when the action violates the automatic stay

provision of § 362(a)(1) and no other provisions of § 362(a). Thus, ULC asserts, if the court finds that the revocation violated any other provision, such as §§ 362(a)(3), (4), (5). or (6), the exception under § 362(b)(4) does not apply. While it is true that § 362(b)(4) limits its application to violations "under subsection (a)(1)," ULC's position is untenable. As the Ninth Circuit has held, and as ULC urges, the provisions of § 362(a) overlap. *Delpit, 18* F.3d at 772. In particular, *Delpit's* expansive reading of § 362(a)(1) creates substantial overlap between it and several other automatic stay provisions. To say that § 362(b)(4) applies only to those actions which fall solely under § 362(a)(1) rejects the integrative reading of § 362(a) which ULC endorses. The appropriate interpretation is that any action which falls under § 362(a)(1) is excepted if the requirements of § 362(b)(4) are met. However, even if ULC's contention is accepted, here, the only provision of § 362(a) that applies to the revocation, (a)(1) is expressly excepted by (b)(4). The Bankruptcy Court correctly concluded that the automatic stay does not bar revocation of ULC's tax-exempt status.

b. § 362(b)(9)

[25] Section 362(b)(9) excepts from the automatic stay "the issuance to the debtor by a governmental unit of a notice of tax deficiency."[3] As the Ninth Circuit has observed,

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[3]This is the text of the statute as it stood on July 20, 1993, when this action commenced. The current § 362(b)(9) is more comprehensive, excepting from the automatic stay: "(A) an audit

§ 362(b)(9) simply "preserves the [IRS] Commissioner's claim against the debtor." *Delpit,* 18 F.3d at 772. It also enables a debtor to litigate in the Tax Court, where jurisdiction is based on a taxpayer's prior receipt of a notice of deficiency. 26 U.S.C. § 6214(a); *Matter of Community Hospital of Rockland County,* 15 B.R. 785, 790 (Bankr. S.D.N.Y.1981).

There is little case law construing § 362(b)(9) more broadly than its plain language. The United States first cites H & H *Beverage Distributors, Inc. v. Dep't of Revenue,* 850 F.2d 165 (3rd Cir.), *cert. denied, 488* U.S. 994, 109 S.Ct. 560, 102 L.Ed.2d 586 (1988), to support the proposition that

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by a governmental unit to determine tax liability; (B) the issuance to the debtor by a governmental unit of a notice of tax deficiency; (C) a demand for tax returns; or (D) the making of an assessment for any tax and issuance of a notice and demand for payment of such an assessment (but, any tax lien would otherwise attach to property of the estate by reason of such an assessment shall not take effect unless such tax is a debt of the debtor that will not be discharged in the case and such property or its proceeds are transferred out of the estateto , or otherwise revested in, the debtor)."

The legislative history to the 1994 amendment of section (b)(9) notes that "it expands the tax exception to the automatic stay. . . . This section will lift the automatic stay as it applies to a . . . demand for tax returns . . . or the making of certain assessments of tax and issuance of a notice and demand for payment for such assessment." H.R.Rep. No. 835, 103rd Cong., 2d Sess. 43 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3340, 3352. The analysis in this opinion would be different it the new provisions were applicable to this case.

actions "integral to issuance of a statutory notice of deficiency" fall tinder the provisions of (b)(9). However, *H & H Beverage* held only that a state tax "notice of audit assessment" was functionally equivalent to what is termed a notice of deficiency by the IRS, and thus was covered by (b)(9). *Id.* at 169. Whether something is the "functional equivalent" of a notice of tax deficiency is not the same as other documents or procedures "integral" to the issuance of a notice of tax deficiency. The government's construction of *H & H Beverage* is unsupported.

At least one other court has also refused to extend the application of § 362(b)(9) beyond the discrete act of issuance of a notice of tax deficiency or its functional equivalent. In *In re Apex Oil* Co., 131 B.R. 712, 715 (E.D.Mo. 1991), the court could not find that the assessment of import duties was the functional equivalent of a notice of tax deficiency, and thus refused to except the assessment from the automatic stay under § 362(b)(9).

The government offers *In re Hardy, 39* B.R. 64 (Bankr.E.D.Pa.1984), to support its expansive reading of (b)(9). *Hardy* found that certain form letters sent to the debtor prior to the notice of tax deficiency were necessary precursors to the notice, and thus came within the scope of (b)(9). *Id.* at 66. The letters informed the debtor that the IRS believed an adjustment should be made to the debtor's taxes and requested that the debtor consent to an extension of the statute of limitations for assessment of tax. *Id.* at 65 nn. 3, 4.

[26] In *Hardy,* the form letters were necessary

prerequisites, under IRS procedures, to the issuance of the final notice of deficiency. Here, the revocation of tax-exempt status is not a legal precondition to the issuance of a notice of deficiency, nor is it the functional equivalent of such notice. As a practical matter, the IRS must revoke an organization's tax-exempt status in order to issue it a notice of tax deficiency, but the two actions are not part of an integrated procedure as were the letters and notice in *Hardy*. In the absence of authority interpreting § 362(b)(9) to include all necessary acts preliminary to the issuance of a notice of tax deficiency, the provision must be construed to be limited by its express language.

[27] The effect of such a holding will limit the application of (b)(9) to cases where the prerequisite acts to the issuance of a notice of tax deficiency have been made before the debtor files its bankruptcy petition. In those cases, the IRS will be in a position to simply issue a post-petition notice of deficiency, an act expressly excepted from the automatic stay by § 362(b)(9). Perhaps to avoid such a narrow application of (b)(9), Congress amended the provision in 1994 to expand its, application to audits and assessments of tax liability. The amendment to (b)(9) supports the inference that the scope of the pre-1994 law was limited to its express terms. In this case, where the pre-1994 statute applies, there is no authority to expand the interpretation of § 362(b)(9) and the exception does, not operate to avoid the automatic stay.

The revocation is excepted from the automatic stay under § 362(b)(4). The bankruptcy court's judgment is

AFFIRMED.

D. Stay of Order Pending Appeal

[28,29] The bankruptcy judge's decision is reviewed for abuse of discretion. The bankruptcy judge (Judge Eisen) denied the request for a stay pending appeal in his order of November 9, 1993. The order does not state the reasons for denial, nor does the transcript of the hearing at which the judge orally denied the stay reveal any findings or explanation for the ruling. ULC asserts that the bankruptcy court again addressed the issue of a stay on May 24, 1995 when the bankruptcy judge was unwilling to revisit the bankruptcy court's previous decision. It is Judge Eisen's decision of November 9, 1993 that must be reviewed. Judge Eisen did not articulate the basis for denial of the stay pending appeal. Denial of a motion to stay enforcement of an order pending appeal is reviewed for abuse of discretion. *In re Wymer,* 5 B.R. 802, 807 (9th Cir. BAP 1980).

An appellant seeking a discretionary stay pending appeal under Bankruptcy Rule 8005 must prove:

(1) appellant is likely to succeed on the merits of the appeal;

(2) appellant will suffer irreparable injury;

(3) no substantial harm will come to appellee;

(4) the stay will do no harm to the public interest.

In re Byrd, 172 B.R. 970, 974 (W.D.Wash. 1994); *In re Wymer,* 5 B.R. 802, 806 (9th Cir. BAP 1980).

[30] It is unclear that ULC is likely to succeed on the merits of its appeal. The decision of the bankruptcy court

regardingthe revocation of tax-exempt status is a separate action from the order to rile income tax returns.

[31] ULC argues that the IRS had no authority to revoke its tax-exempt status and to demand the filing of tax returns because the district court, not the IRS, granted ULC its tax-exempt status in the first place. Therefore, ULC asserts, the separation of powers doctrine requires the IRS to seek approval from the district court before revoking ULC's tax-exempt status in this case. ULC argues that collateral estoppel and res judicata bind the IRS to the district court's earlier decision to grant tax-exempt status until the district court makes a new determination that changed circumstances warrant revocation of such status. As ULC correctly argues, collateral estoppel is applicable even where some facts differ in the two cases it issue, if "the differing facts were not 'essential to the judgment' or 'of controlling significance' in the first case." *Starker v. United States,* 602 F.2d 1341, 1346 (9th Cir.1979).

The district court ordered that ULC was entitled to tax-exempt status in *Universal Life Church, Inc. v. United States,* 372 F. Supp. 770 (E.D.Cal.1974). The court's decision was based solely on its finding that ULC's ordination of ministers, its granting of church chatters, and its issuance of Honorary Doctor of Divinity titles were not substantial activities which did not further any religious purpose. *Id.* at 776. In contrast. the IRS decision to revoke tax-exempt status for fiscal years 1982-1985 was based on at least six distinct and different grounds, including that the net earnings

of ULC inured to the benefit of private individuals, that ULC provided advice to individuals on the purported tax benefits available to ministers of ULC, and that ULC had furthered a substantial nonexempt purpose in administering and operating the receipts and disbursements program to its members and congregations. (Appellant's Excerpt it 40.) These factors were found to exist during the 1982-1.985 time period, approximately eight to ten years after the court's decision on tax-exempt status. Because the dispositive facts in each case were different, collateral estoppel does not bar the IRS from revoking ULC's tax-exempt status for the time period 1982-1985.

Nor is the initial forum for determination of tax-exempt status the district court. The district court gained jurisdiction over the matter in 1974 when ULC challenged payment of taxes in a refund suit, claiming that the IRS had erroneously denied tax-exempt status. *Universal Life Church,* 372 F.Supp. at 770-71. However, the initial determination of tax status was with the IRS. ULC has not provided authority that the IRS does not have initial jurisdiction to revoke tax-exempt status and then order the filing of tax returns.

[32] Second, ULC has not shown that it will suffer irreparable harm. ULC continues to assert that the filing of tax returns will be an admission of tax liability. ULC's citations to *United States v. Dinnell,* 428 F.Supp. 205, 208 (D.Ariz.1977), *aff'd,* 568 F.2d 779 (9th (Cir.1978), and *United States v. Hornstein,* 176 F.2d 217, 220 (7th Cir.1949), do not support this contention. These two cases stand only

for the proposition that facts asserted in a tax return, e.g. the costs of goods sold in a particular year, are admissions as to those facts, and create a rebuttable presumption that such facts are true. However, these cases do not hold that the act of filing a tax return is an admission that one owes taxes. If that were the case, there would be no procedure for obtaining refunds after filing a tax return.[4]

ULC has also failed to show that the revocation will cause irreparable harm to theof contributions ULC receives to support itself. The revocation concerns only three past years. It does not concern present tax status and thus should not affect current contributions to ULC.

ULC has failed to make the requisite showing on the first two elements. Accordingly, the bankruptcy court's order is affirmed and the motion to stay pending appeal is DENIED.

E. *Request for Briefing Schedule*

This request appears to be moot.

CONCLUSION

For the reasons specified above, the orders of the bankruptcy court finding no violation of the automatic stay and denying a stay pending appeal are AFFIRMED.

SO ORDERED.

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[4]The court acknowledges that ULC has elected to pursue its remedy under 11 U.S.C. § 505 in the bankruptcy court rather than seek a refund under Title 26. However, this does not change the fact that the filing of tax returns is only an admission of the underlying facts asserted in the return and not an admission of tax liability or tax status.

APPENDIX B

UNITED STATES BANKRUPTCY COURT
FOR THE
EASTERN DISTRICT OF CALIFORNIA

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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

In re:	)	
	)	
UNIVERSAL LIFE	)	
CHURCH, INC.,	)	Case No. 989-03284a
California non-profit	)	Adversary No. 990-0003
corporation,	)	Chapter 11 Case
Debtor.	)	

FIRST AMENDED ORDER ON MOTION FOR ORDER THAT THE IRS REVOCATION OF TAX EXEMPT STATUS AND DETERMINATION THAT THE DEBTOR IS NOT TAX EXEMPT UNDER SECTION 501 FOR THE FISCAL YEARS ENDED APRIL 30, 1982 THROUGH APRIL 30, 1985, INCLUSIVE IS ABSOLUTELY VOID, AND FOR DAMAGES

The hearing on the Motion for Order That The IRS Revocation of Tax Exempt Status And Determination That The Debtor Is Not Tax Exempt Under Section 501 For The Fiscal Years Ended April 30,1982 Through April 30, 1985, Inclusive Is Absolutely Void, And For Damages ("Motion") filed by the Debtor, UNIVERSAL LIFE CHURCH, INC., a California non-profit corporation, was held in the above-entitled Court at Modesto, California, on August 30, 1993, HON. J.W. HEDRICK, JR., U.S. Bankruptcy Judge presiding. Debtor appeared by and through counsel, CARL W. COLLINS of the law firm of ALTMAN, COLLINS & GROSS and EDWARD O.C. ORD of the law firm of ORD & NORMAN. The UNITED STATES OF AMERICA appeared by and through counsel, ROBERT D. METCALFE III, Trial Attorney, Tax Division, U.S. Department of Justice. The Court, finding that proper and timely notice of the hearing has been given, having reviewed and considered the Motion and supporting documents, and having considered the argument presented by counsel, announced its decision.

NOW, THEREFORE IT IS ORDERED:

1. That based upon the record before this Court, the Debtor's Motion is denied on the grounds that the revocation of the Debtor's tax exempt status under Section 501 of the Internal Revenue Code for the Fiscal Years ended April 30, 1982 through April 30, 1985, inclusive, by the Internal Revenue Service is not a violation of the automatic stay of

Section 362(a) of the Bankruptcy Code and, moreover, if it were it falls within the exception to the provisions of the automatic stay under Section362(b)(4) of the Bankruptcy Code.

/s/J. W. Hedrick, Jr.
J.W. HEDRICK,JR.
U.S. Bankruptcy Judge

Dated:
Nov 18, 1993

APPENDIX C

BANKRUPTCY CODE (11 U.S.C.)

(AS IN EFFECT PRIOR TO THE BANKRUPTCY REFORM ACT OF 1994, PUB. L. 103-394)

Bankruptcy Code (11 U.S.C.) (as in effect prior to the Bankruptcy Reform Act of 1994, Pub. L. 103- 394):

§ 362. Automatic Stay

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 U.S.C. 78eee(a) (3)), operates as a stay, applicable to all entities, of

(1) the commencement or continuation, including the issuance or employment of process, of a judicial,administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

(7) the setoff of any debt owing to the debtor that arose before commencement of the case under this title against any claim against the debtor; and

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning the debtor.

(b) The filing of a petition under Section 301, 302, or 303 of this title, or of an application under section 5(a) (3) of the Securities Investor Protection Act of 1970 (15 U.S.C. 78eee(a) (3)), does not operate as a stay --

(1) under subsection (a) of this section, of the commencement or continuation of a criminal action or proceedings against the debtor;

(2) under subsection (a) of this section, of the collection of alimony, maintenance, or support

from property that is not property of the estate;

(3) under subsection (a) of this section, of any act to perfect an interest in property to the extent that the trustee's rights and powers are subject to such perfection under section 546(b) of this title or to the extent that such act is accomplished within the period provided under section 547(e)(2)(A) of this title;

(4) under subsection (a)(1) of this section, of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;

(5) under subsection (a)(2) of this section, of the enforcement of a judgment, other than a money judgment, obtained in an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;

(6) under subsection (a) of this section, of the setoff by a commodity broker, forward contract merchant, stockbroker, financial institutions, or securities clearing agency of any mutual debt and claim under or in connection with commodity contracts, as defined in section 761(4) of this title, forward contracts, or securities contracts, as defined in section 741(7) of this title, that constitutes the

setoff of a claim against the debtor for a margin payment, as defined in section 101(34), 741(5), or 761(15) of this title, or settlement payment, as defined in section 101(35) or 741(8) of this title, arising out of commodity contracts, forward contracts, or securities contracts against cash, securities, or other property held by or due from such commodity broker, forward contract merchant, stockbroker, financial institutions, or securities clearing agency to margin, guarantee, secure, or settle commodity contracts, forward contracts, or securities contracts;

(7) under subsection (a) of this section, of the setoff by a repo participant, of any mutual debt and claim under or in connection with repurchase agreements that constitutes the setoff of a claim against the debtor for a margin payment, as defined in section 741(5) or 761(15) of this title, or settlement payment, as defined in section 741(8) of this title, arising out of repurchase agreements against cash, securities, or other property held by or due from such repo participant to margin, guarantee, secure or settle repurchase agreements;

(8) under subsection (a) of this section, of the commencement of any action by the Secretary of Housing and Urban Development to foreclose a mortgage or deed of trust in any case in which the

mortgage or deed of trust held by the Secretary is insured or was formerly insured under the National Housing Act and covers property, or combinations of property, consisting of five or more living units;

(9) under subsection (a) of this section, of the issuance to the debtor by a governmental unit of a notice of tax deficiency;

(10) under subsection (a) of this section, of any act by a lessor to the debtor under a lease of nonresidential real property that has terminated by the expiration of the stated term of the lease before the commencement of or during a case under this title to obtain possession of such property; or

(11) under subsection (a) of this section, of the presentment of a negotiable instrument and the giving of notice of and protesting dishonor of such an instrument;

(12) under subsection (a) of this section, after the date which is 90 days after the filing of such petition, of the commencement or continuation, and conclusion to the entry of final judgment, of an action which involves a debtor subject to reorganization pursuant to chapter 11 of this title and which was brought by the Secretary of Transportation under the

Ship Mortgage Act, 1920 (46 App. U.S.C. 911 et seq.) (including distribution of any proceeds of sale) to foreclose a preferred ship or fleet mortgage, or security interest in or relating to a vessel or vessel under construction, held by the Secretary of Transportation under section 207 or title XI of the Merchant Marine Act, 1936 (46 App. U.S.C. 1117 and 1271 et seq., respectively), or under applicable State law;

(13) under subsection (a) of this section, after the date which is 90 days after the filing of such petition, of the commencement or continuation, and conclusion to the entry of final judgment, of an action which involves a debtor subject to reorganization pursuant to chapter 11 of this title and which was brought by the Secretary of Commerce under the Ship Mortgage Act, 1920 (46 App. U.S.C. 911 et seq.) (including distribution of any proceeds of sale) to foreclose a preferred ship or fleet mortgage in a vessel or a mortgage, deed of trust, or other security interest in a fishing facility held by the Secretary of Commerce under section 207 or title XI of the Merchant Marine Act, 1939 (46 App. U.S.C. 1117 and 1271 et seq., respectively);

(14) under subsection (a) of this section, of the setoff by a swap participant, of any mutual debt

and claim under or in connection with any swap agreement that constitutes the setoff of a claim against the debtor for any payment due from the debtor under or in connection with any swap agreement against any payment due to the debtor from the swap participant under or in connection with any swap agreement or against cash, securities or other property of the debtor held by or due from such swap participant to guarantee, secure or settle any swap agreement

(14) under subsection (a) of this section, of any action by an accrediting agency regarding the accreditation status of the debtor as an educational institution;

(15) under subsection (a) of this section, of any action by a State licensing body regarding the licensure of the debtor as an educational institution; or

(16) under subsection (a) of this section, of any action by a guaranty agency, as defined in section 435(j) of the Higher Education Act of 1965 (20 U.S.C. 1001 et seq.) or the Secretary of Education regarding the eligibility of the debtor to participate in programs authorized under such Act.

The provisions of paragraphs (12) and (13) of this subsection shall apply with respect to any such petition filed on or before December 31, 1989.

Supreme Court, U.S.
FILED
MAY 29 1998
OFFICE OF THE CLERK

No. 97-1618

In the Supreme Court of the United States

OCTOBER TERM, 1997

UNIVERSAL LIFE CHURCH, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the revocation of petitioner's tax-exempt status by the Commissioner of Internal Revenue was within the exception to the automatic stay in bankruptcy for "the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power" (11 U.S.C. 362(b)(4)).

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No. 97-1618

UNIVERSAL LIFE CHURCH, INC., PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A19) is reported at 128 F.3d 1294. The opinion of the district court (Pet. App. A37-A63) is reported at 191 B.R. 433. The opinion of the bankruptcy court (Pet. App. B64-B66) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 6, 1997. The petition for rehearing was denied on December 30, 1997. The petition for a writ of certiorari was filed on March 30, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On November 30, 1989, petitioner filed a voluntary petition in bankruptcy under Chapter 11 of the Bankruptcy Code. Petitioner thereafter commenced an adversary proceeding under 11 U.S.C. 505 to determine its federal and state tax liabilities for various taxable periods. Petitioner maintained that it was exempt from federal income taxes for the fiscal years ending April 30, 1978, through April 30, 1990 (Pet. App. A7).

On January 8, 1991, the Commissioner of Internal Revenue formally revoked petitioner's tax-exempt status for the fiscal years ending April 30, 1982, through April 30, 1985. The Commissioner informed petitioner at that time that, pursuant to 26 U.S.C. 6012, petitioner was required to file federal income tax returns for those years (Pet. App. A7).

2. On July 20, 1993, petitioner filed a motion in bankruptcy court seeking a declaration that the Commissioner's revocation of its tax-exempt status violated the automatic stay of 11 U.S.C. 362(a). In addition, petitioner sought damages for the asserted violation of the stay pursuant to 11 U.S.C. 362(h) (Pet. App. A7-A8).

The bankruptcy court denied the motion. The court concluded that, even if the revocation of petitioner's tax-exempt status were within the scope of the automatic stay, it is within the exception from the stay for "the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power" (11 U.S.C. 362(b)(4)) (Pet. App. B65-B66).[1] The

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[1] In a parallel proceeding, the bankruptcy court ordered petitioner to file federal tax returns (Pet. App. A8). The

district court affirmed the order of the bankruptcy court (*id.* at A37-A63).

3. The court of appeals affirmed (Pet. App. A1-A19). The automatic stay of 11 U.S.C. 362(a) is designed specifically to stay certain actions aimed at enforcing or collecting claims against the debtor. The court of appeals assumed, without deciding, that the act of revoking a debtor's tax-exempt status is within the scope of the automatic stay (Pet. App. A8). The court concluded, however, that the revocation of tax-exempt status was nonetheless exempted from the automatic stay under 11 U.S.C. 362(b)(4) as an "act to enforce" the government's "police or regulatory powers" (Pet. App. A8).

The court concluded that the phrase "police or regulatory power" refers to the enforcement of laws affecting health, welfare, morals and safety, but not to regulatory laws that directly conflict with the control of the res or property by the bankruptcy court (Pet. App. A9). The court held that the revocation of petitioner's tax-exempt status "was an exercise of the IRS's police or regulatory power because revocation promotes public welfare by assuring the public and potential donors that contributions will be used for legitimate charitable purposes" (*id.* at A10). The court concluded that the "determination that an organization may not meet the standards for tax exempt status in itself serves a general public welfare purpose beyond any pecuniary application in a particular case" (*id.* at A11). In this context, revocation of tax-exempt status is a form of "fraud detection" that justifies invocation of the police-power exception even if

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appeal filed by petitioner from that order is currently pending in the district court (*id.* at A18-A19).

a governmental pecuniary interest also exists (*ibid.*). Revocation of tax-exempt status directly serves this significant law enforcement function (*id.* at A12).

The court of appeals also rejected petitioner's argument that the government is collaterally estopped from revoking petitioner's tax-exempt status. The court pointed out that, although a federal district court had previously determined that petitioner was entitled to tax exempt status for the fiscal year ending April 30, 1969 (*Universal Life Church, Inc.* v. *United States*, 372 F. Supp. 770 (E.D. Cal. 1974)), that decision is not controlling for the different period (1982-1985) addressed by the Commissioner's more recent determination. The bases for denying exempt status were different and the facts had changed significantly since the prior judgment (Pet. App. A17). Indeed, a subsequent decision had upheld the Commissioner's revocation of petitioner's tax-exempt status for several intervening fiscal years. See *Universal Life Church, Inc.* v. *United States*, 13 Cl. Ct. 567, 580 (1987), aff'd, 862 F.2d 321 (Fed. Cir. 1988) (Table).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. The question presented in this case lacks any continuing importance. In 1994, Congress amended Section 362(b)(9) to except from the automatic stay all tax audits, demands for tax returns and assessments of tax liability. Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, Tit. I, § 116, 108 Stat. 4119. If, as petitioner argues, the revocation of a debtor's tax-exempt

status is an act within the scope of the automatic stay because it constitutes part of the "administrative process leading to assessment" (Pet. 12), the act of revocation would fall directly within the scope of the new exception. As petitioner acknowledges, Section 362(b)(9) "now allows the IRS to take all actions up to the last discrete act of assessment" (Pet. 24 n.11). Whether revocation of a debtor's tax-exempt status is exempted from the automatic stay not only under Section 362(b)(9) but also because it is within the police or regulatory power exception from the stay under Section 362(b)(4) therefore has only academic significance for cases arising after 1994.

2. When a petition for relief is filed in bankruptcy court, Section 362(a)(1) of the Bankruptcy Code generally stays the commencement or continuation of a judicial or administrative proceeding (i) against the debtor that was or could have been commenced before the commencement of the bankruptcy case or (ii) to recover a prebankruptcy claim against the debtor. 11 U.S.C. 362(a)(1). Several exceptions to that automatic stay are provided in Section 362(b). One of the exceptions specifies that the automatic stay does not apply to "the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power." 11 U.S.C. 362(b)(4).

In the present case, the court of appeals did not decide whether the automatic stay would, on its own terms, apply to the act of revoking a debtor's tax-exempt status. Instead, the court of appeals held that such a revocation would in any event be excepted from the automatic stay under the "police or regulatory power" exception of Section 362(b)(4).

In determining whether a governmental act comes within the ambit of Section 362(b)(4), courts have focussed on whether the action represents a direct application of police or regulatory powers or is instead aimed at obtaining a pecuniary advantage over other creditors of the debtor's estate. The courts below correctly characterized the government's function in revoking an invalid tax exemption "as a type of fraud detection, assuring potential donors that the organization will not use their contributions for personal profit, but for charitable purposes encouraged by law" (Pet. App. A11). For this reason, as the courts below held, the revocation of petitioner's tax-exempt status falls squarely within the text and purpose of Section 362(b)(4).[2]

3. Petitioner does not allege that a conflict exists among the circuits on the question whether revocation of a debtor's tax-exempt status falls within the "police or regulatory power" exception of Section 362(b)(4). Indeed, it appears that no other court of appeals has had an occasion to address this particular question.[3]

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[2] Although the issue is not included within the scope of the question presented in the petition, petitioner contends that the government was collaterally estopped by a 1974 ruling on petitioner's tax-exempt status for 1969 from revoking its tax-exempt status for subsequent years (Pet. 25-28). That contention was correctly rejected by the court of appeals, for the reasons explained in its opinion (Pet. App. A17-A18) and at page 4, *supra*. Petitioner's assertions concerning collateral estoppel are, in any event, based upon the facts of this case and do not present an issue warranting review by this Court.

[3] The Fourth Circuit held in *Clark* v. *United States (In re Heritage Village Church and Missionary Fellowship, Inc.)*, 851 F.2d 104 (1988), that revocation of a debtor's tax-exempt status does not violate the automatic stay. That court had no occasion

Petitioner instead seeks to rely (Pet. 13) on the assertion that there is an abstract divergence of the standards announced by the courts of appeals in various cases involving the police or regulatory power exception in different contexts. That is not the type of direct conflict among the circuits that warrants the grant of certiorari by this Court. The Court has long emphasized that "it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases *where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal*" (*Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U.S. 387, 393 (1923) (emphasis added)). "[T]here must be a real or 'intolerable' conflict on the same matter of law or fact, not merely an inconsistency in dicta or in the general principles utilized." R. Stern, E. Gressman, S. Shapiro & K. Geller, *Supreme Court Practice* § 4.3, at 167 (7th ed. 1993).

Moreover, the formulation of the "police or regulatory power" exception by the court of appeals in this case is not inconsistent with the formulations announced by other courts. In particular, notwithstanding petitioner's assertion to the contrary (Pet. 13), it is not inconsistent with the formulation adopted by the Sixth Circuit in *Word* v. *Commerce Oil Co. (In re Commerce Oil Co.)*, 847 F.2d 291, 295 (1988). In that

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to (and did not) consider whether such a revocation would fall within the "police or regulatory power" exception of Section 362(b)(4) of the Bankruptcy Code; instead, it held that the act of revocation did not come even within the scope of the automatic stay provisions of Section 362(a). 851 F.2d at 105.

case, the Sixth Circuit stated that "reviewing courts [are to] focus on whether the governmental proceeding relates primarily to the protection of the government's pecuniary interest in the debtor's property, and not to matters of public safety." That is not inconsistent with the statement of the court of appeals in the present case that "the court determines whether the government action relates primarily to the protection of the government's pecuniary interest in the debtor's property or to matters of public safety and welfare" (Pet. App. A10). See also *Yellow Cab Coop. Ass'n* v. *Metro Taxi, Inc. (In re Yellow Cab Coop. Ass'n)*, 132 F.3d 591, 597 (10th Cir. 1997); *NLRB* v. *Edward Cooper Painting, Inc.*, 804 F.2d 934, 942 (6th Cir. 1986).

Petitioner errs in contending (Pet. 22) that a conflict exists between the decision of the court of appeals in this case and the decision of this Court in *United States* v. *Whiting Pools, Inc.*, 462 U.S. 198 (1983). Petitioner does not assert that there is a conflict between the actual holdings of these two quite different cases. Instead, petitioner asserts that, in the decision below, the court of appeals effected "a judicially-created exception to the automatic stay" (Pet. 23) whereas, in *Whiting Pools*, this Court declined (in an entirely different context) to do so. Even if petitioner's characterization of *Whiting Pools* were correct, which it is not,[4] that decision does not estab-

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[4] The issue in *Whiting Pools* was whether the Internal Revenue Service is required to turn over to the bankruptcy estate personal property seized from the debtor prior to bankruptcy that had not yet been sold. The Court's resolution of that issue did not turn on the interpretation of exceptions to the automatic stay provision; instead, it turned on whether the

lish even a theoretical conflict with this case. The government neither sought nor received a special, "judicially-created exception to the automatic stay" in this case. The exception to the stay involved in this case was provided expressly by Congress, in Section 326(b)(4) of the Bankruptcy Code. Nothing in *Whiting Pools*—or even in petitioner's characterization of that case—is inconsistent with the decision of the courts below.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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debtor's estate retained an interest in the seized property. 462 U.S. at 209-210.